BARRIERS TO OPPORTUNITY: DO OCCUPATIONAL LICENSING LAWS UNFAIRLY LIMIT ENTREPRENEURSHIP AND JOBS

HEARING

BEFORE THE

SUBCOMMITTEE ON CONTRACTING AND WORKFORCE

OF THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

HEARING HELD
MARCH 26, 2014

Small Business Committee Document Number 113–063
Available via the GPO Website: www.fdsys.gov

U.S. GOVERNMENT PRINTING OFFICE

87–281 WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

HOUSE COMMITTEE ON SMALL BUSINESS

SAM GRAVES, Missouri, *Chairman*
STEVE CHABOT, Ohio
STEVE KING, Iowa
MIKE COFFMAN, Colorado
BLAINE LUETKEMER, Missouri
MICK MULVANEY, South Carolina
SCOTT TIPTON, Colorado
JAIME HERRERA BEUTLER, Washington
RICHARD HANNA, New York
TIM HUELSKAMP, Kansas
DAVID SCHWEIKERT, Arizona
KERRY BENTIVOLIO, Michigan
CHRIS COLLINS, New York
TOM RICE, South Carolina
NYDIA VELÁZQUEZ, New York, *Ranking Member*
KURT SCHRADER, Oregon
YVETTE CLARKE, New York
JUDY CHU, California
JANICE HAHN, California
DONALD PAYNE, JR., New Jersey
GRACE MENG, New York
BRAD SCHNEIDER, Illinois
RON BARBER, Arizona
ANN McLANE KUSTER, New Hampshire
PATRICK MURPHY, Florida

LORI SALLEY, *Staff Director*
PAUL SASS, *Deputy Staff Director*
BARRY PINELES, *Chief Counsel*
MICHAEL DAY, *Minority Staff Director*

CONTENTS

OPENING STATEMENTS

WITNESSES

APPENDIX

BARRIERS TO OPPORTUNITY: DO OCCUPATIONAL LICENSING LAWS UNFAIRLY LIMIT ENTREPRENEURSHIP AND JOBS?

WEDNESDAY, MARCH 26, 2014

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building. Hon. Richard Hanna [chairman of the subcommittee] presiding.

Present: Representatives Hanna, Meng, and Nunnelee.

Chairman HANNA. The hearing is called to order.

First, I want to thank the witnesses for being with us today as we discuss an issue that relates to economic opportunity for our citizens: the proliferation of state occupational licensing laws and the effects these have on entrepreneurship and job creation.

As the private economy continues to struggle to create a sufficient number of jobs to replace those lost in the recession, many unemployed and underemployed Americans are taking it up on themselves to use whatever skills or talents they have to start their own business and earn income.

Unfortunately, for many of these would-be entrepreneurs, they may need some sort of government approval in order to do so. One of the most difficult forms of that approval is an occupational license. While the intent of occupational licenses are to protect public health and safety or to protect consumers from bad actors, the scope and complexity of occupational licensing has grown considerably in recent years.

Yet, as these trends develop, there is mounting evidence that many of the public benefits arguments used to justify occupational licenses are tenuous at best. Instead, some licensing laws appear to be designed not to protect life, safety, or property, but to protect existing businesses from competition. For example, while many Americans would not be surprised to know that doctors and lawyers need a state-issued license to practice their trade, they may be surprised to learn that it is illegal for a person to braid hair, work as an interior decorator or operate an obedience school for dogs without a state-issued license, and they may be more shocked to learn what obtaining such a license entails.

In a recent report, the Institute for Justice found that the education and training requirements for many of these professions to obtain a license exceed those needed to become an emergency med-

ical technician, an occupation where lives are at risk. The cost of such excessive licensing requirements can be measured in reduction in new business startups, job loss, higher prices for consumers or increased income inequality.

According to another study, job creation in certain professions is 20 percent lower in a licensed state versus unlicensed state. Many of the entrepreneurial opportunities lost to excessive occupational licensing are in jobs most likely to be pursued by the economically disadvantaged. The issue of state and local occupational licensing raises several questions for Congress. While the federal policymakers have an interest in promoting the principles of economic liberty and preventing discriminatory practices that limit opportunity, especially for the disadvantaged, we must also respect the principle of federalism, which gives states the right to regulate activities that take place within their borders.

Our purpose today is not to answer the question of whether states should or should not regulate; it is to examine how certain occupational licensing laws have become excessive and discuss options for reform to enhance economic opportunity and help our economy and its people grow jobs and prosper.

I now yield to the ranking member for her comments.

Ms. MENG. Thank you, Mr. Chairman.

Licensing is a process by which the state makes it illegal to do a certain job unless one completes a series of mandatory requirements. The requirements are usually set by a licensing board made up of members of the profession or by legislatures with significant input from current professionals. The origin of these limits have promising goals and was intended to protect the safety and well-being of residents, but since the 1950s, the number of licensed workers has jumped from just 5 percent of the workforce to nearly 30 percent today. In total, roughly 1,100 occupations now require some sort of license by at least one state. Much of the time these licenses require fees to be paid, training of some sort, and written examinations. While the requirements serve a functional purpose, they are also a barrier for entrepreneurs to enter an occupation.

Today's hearing will give us the opportunity to learn more about the genesis of professional licensing and its evolution. Though this issue is one for the states to take up, it is nevertheless important for us to bring it to the forefront. Licensing requirements have exploded to new fields, some that merit regulations and others that raise the question of whether there is too much licensing. States have broad powers to regulate their workers and have a duty to protect their residents. Requiring certain professions to meet strict licensing rules only makes sense in that regard.

However, we must look at the implications licensing has on entrepreneurs. They are the backbone of our economy and we rely on them for innovation and growth. Requirements for training fees and examinations can keep qualified individuals from starting a busy profession, and a lack of uniformity among the states and their licensing rules impact many entrepreneurs attempting to move to another market where they see an opportunity for business growth. States should not be hindering growth in these viable markets for business expansion or creation. They should be fostering these self-starters.

Encouraging competition for small firms is critical to job creation and economic growth. The Sherman Antitrust Act was created to do just that—protect consumers and business owners from anti-competitive behavior. We will hear from witnesses about how antitrust law applies to cases involving licensing boards and what approach is best for ensuring qualified individuals can enter an occupation without fear of excessive costs.

Despite the fact that this topic belongs on the state level, the well-being of American entrepreneurs is a concern to the nation as a whole. That is why I am glad we are holding this hearing. It will give us a chance to hear some personal experiences of those who have successfully navigated state regulations and what insights they can provide to reform the system. As more Americans begin to take risks and start their own businesses, it is vital to bring licensing requirements to their attention. Balancing the need for market competition with the need for consumer protections will give small firms the certainty they require.

We are here today to learn more about licensing rules and how to address the possibility of over-licensing. In order to ensure the success of our self-employed, we must understand the challenges and benefits these laws hold for entrepreneurs.

I thank all the witnesses for being here today, and I look forward to your comments.

Thank you, and I yield back.

Chairman HANNA. Thank you.

If Committee members have an opening statement, I ask that they submit them for the record.

I will just take a minute to explain to you the lights. It is a little bit like your stewardess explaining the seatbelt. You have five minutes. We will be lenient. You will see the yellow light go on. That is a minute left.

And with that I will yield to Mr. Nunnelee from Mississippi who will introduce our first witness. Go ahead. You may begin.

Mr. NUNNELEE. Thank you, Mr. Chairman.

It is my privilege to be before this Committee, even though I am not on the Committee. I thank you for allowing me to be here with my constituent and friend, Melony Armstrong.

I met Melony five years ago when she was a small business operator, and I was serving in the state Senate. I was her senator. And Melony was attempting to grow a business helping to teach other people how to be small business operators, and she was restrained by the process of state regulation. And she came to me as her legislator. Before she came to see me, she had attempted to get relief through the administration, the regulatory process, and had not been successful. She then went into the courts and that process was dragging on too long. And I think if I would ask this Committee to take anything away from my part of this hearing, it is when Melony Armstrong came to the state legislature, she found a willing ear to listen and we responded, and within 90 days we fixed the problem, we put legislation on Governor Haley Barbour's desk that he signed into law. And I would ask the Committee to reflect if she had come to the Congress asking for similar relief, how long would it have taken and would we still be debating the issue that we solved in 90 days at the state level. I think there is

a real reason the states are known as the great laboratories of democracy.

So with that, Melony Armstrong from Tupelo, Mississippi, we are glad to have you here today to testify before this Committee.

Chairman HANNA. Ms. Armstrong, you may begin.

STATEMENTS OF MELONY ARMSTRONG, OWNER, NATURALLY SPEAKING; TIMOTHY SANDEFUR, PRINCIPAL ATTORNEY, PACIFIC LEGAL FOUNDATION; PATTI MORROW, PRESIDENT, INTERIOR DESIGN PROTECTION CONSULTING; REBECCA HAW, ASSISTANT PROFESSOR OF LAW, VANDERBILT LAW SCHOOL

STATEMENT OF MELONY ARMSTRONG

Ms. ARMSTRONG. Thank you, Mr. Chairman, and members of this Committee. My name is Melony Armstrong.

Every day, hundreds of low-income families are housed because of my work, but I do not run a shelter. They are clothed through what I have done but I do not run a second-hand clothing store. They are fed because of what I achieve, but I do not run a soup kitchen. I have transformed the lives of hundreds of poor women in my state of Mississippi, not because I sought out government assistance; rather, because I asked the government to get out of my way.

I demanded that the government get out of my way so that I could provide for myself and for my family and so other women around me could do likewise in peace, dignity, and prosperity. And if a lone braider in Tupelo, Mississippi could have such a transformative impact helping to change the law to free so many around to earn an honest living, imagine what could happen across our nation if state and local governments followed that example.

Not every entrepreneur is a Bill Gates or Henry Ford. Some are and will remain more humble in the scope of their impact, but each day we all demonstrate the power of one entrepreneur.

African hair braiding is a skill that has been passed from one generation of women to another for the past 3,000 years of recorded history. For the vast majority of human history, women like me have practiced this craft with no government oversight, with no government-issued license, and with no government-imposed demands. We learned from the previous generations by doing, and in so doing we were free to earn a living for our families.

But even with that history to open my hair-braiding salon, Naturally Speaking in Tupelo, Mississippi in 1999, I had to file a lawsuit and lobby the state to change the hair-braiding law in my state so I could get to work. To get paid to braid hair, many states demand braiders to obtain a cosmetology license or other similar license, typically requiring up to 2,100 hours of coursework. That is more than a year's worth of work study, 40 hours a week taking classes that do not teach braiding. Let me say that again. The government in many states requires would-be braiders to take thousands of hours of classes that have literally nothing to do with the trade they want to practice. To teach others to braid hair in Mississippi required me to take more than 3,000 hours of classes and apply for a school license, hours I could use more productively running my own business. And the 3,200 classroom hours it would

have taken for me to earn a license to teach hair braiding, I could have instead become licensed in all of the following occupations in Mississippi—emergency medical technician, emergency medical technician as a paramedic, ambulance driver, law enforcement officer, firefighter, real estate appraiser, a hunting education instructor, and that would have all taken more than 600 hours less than obtaining a license to teach hair braiding.

The cosmetology establishment benefitted most from Mississippi's regulations. Practicing cosmetologists made up the State Board of Cosmetology and they did their best to keep competition to a minimum and to ensure cosmetology schools enjoy captive customers in the form of students.

It was in August 2004 I joined two aspiring hair braiders and the Institute for Justice, a public interest law firm that represented us for free. We filed a lawsuit to break down the regulatory walls barring potential entrepreneurs from entering the field. In the months that followed, I took weekly trips to the state capital of Jackson. It was a seven-hour roundtrip trip from Tupelo, working to convince legislators to change the law. We did not go to the government seeking a handout; instead, we asked the government to get out of our way.

In 2005, our efforts paid off. Mississippi's governor signed legislation enabling hair braiders to practice without the burdensome government-mandated classes. The only requirements now are that hair braiders must pay a $25 fee to register with the state and abide by all relevant health and hygiene codes. Since the restrictions were lifted, more than 800 women provide for themselves as hair braiders taking once underground businesses legit and opening new enterprises in a place where customer demand was once unmet. And because of the change in Mississippi's laws, aspiring hair braiders are moving here from nearby states, including Tennessee, Alabama, and Arkansas.

Free from the needless government-created barriers, I have gone on to teach more than 125 individuals how to braid hair. No longer blocked from putting industrious individuals to work, I have employed 25 women, enabling them to provide for themselves and their families. For many of these women, the money they earn from braiding represents the first steady paycheck they have earned in their entire lives.

Thank you for holding this hearing to alert the public to this problem. I hope lawmakers in every state across this country are paying attention and will heed our calls to remove the laws that do nothing to prevent honest competition in trades from coast to coast.

Thank you.

Chairman HANNA. Thank you, Ms. Armstrong. Eloquently said.

Our next witness is Tim Sandefur, principal attorney at the Pacific Legal Foundation. Mr. Sandefur has successfully challenged various state laws that unfairly inhibit entrepreneurship in California, Oregon, and Missouri. In addition to his work with the Pacific Legal Foundation, he is author of three books that examine how government regulation inhibit economic liberty.

Mr. Sandefur, thank you for being here. You may begin.

STATEMENT OF TIMOTHY SANDEFUR

Mr. SANDEFUR. Thank you very much.

You know, we are here discussing the right to earn a living without unreasonable government interference which is the most neglected civil right in America. The right to earn a living without unreasonable interference from the government was protected by English and American courts as far back as William Shakespeare's day, but unfortunately, today, lawmakers and judges typically turn a blind eye to this right and it gets sacrificed by agencies that are acting often in the best interest of established firms. Today, one-third of all occupations requires government permission in order to go into a business. Even a business like being a florist in Louisiana, you have to get government approval before you can do this. Now, licensing laws were originally invented to protect consumers against shoddy or incompetent or dishonest practices, and research shows that they are not really that effective at doing that, but even so, that is at least legitimate. Unfortunately, these laws are frequently abused by established insiders to prevent competition by raising educational requirements, raising the costs of examinations, increasing continuing education requirements, forcing people to get college degrees before they are allowed to take the application examination, and other kinds of requirements that lower access to services to consumers, raise prices to consumers, and what is most important to me, restrict economic opportunity typically to those who need it the most.

For example, you have to have a college degree to be an interior designer in Florida. Well, 47 percent of blacks and Hispanics have college degrees in Florida, and 66 percent of whites do. So not surprisingly, a restriction like that tends to have a racially disproportionate impact and a class disproportionate impact, restricting economic opportunity for precisely those people who most need entry-level employment and what we used to call the American dream.

Even more absurdly, people do not really rely on occupational licenses that much to protect themselves as consumers. More often they rely on reviewing websites, like Yelp or Angie's List or word of mouth from friends who have gone to a business and been treated well or badly there. So they are not really very effective in the first place at protecting the public. But these restrictions limit people from entering into trades unless they receive high education requirements. Or I mentioned testing costs. A lot of the times these examinations to get a license are held in inconvenient or distant places. The examination to get a license as a florist in Louisiana, for example, is offered only once quarterly in Baton Rouge. So if you live somewhere else in Louisiana and you want to be a florist, you have to pay for travel and lodging expenses in addition to the cost of taking the examination just because you want to arrange flowers.

Another kind of licensing restriction that does not get enough attention is the Certificate of Public Convenience and Necessity law. This is a licensing law that on its own terms is not intended to protect consumers against dangerous or dishonest business practices but exists explicitly for the purpose of protecting established firms against legitimate competition.

Just last month, I won a lawsuit challenging the constitutionality of Kentucky's licensing law for moving companies. That state, like 22 other states, says if you want to go into the business of being a mover you first have to get permission from all of the existing moving companies in the state. You file your application to run a moving company. All the existing movers are notified and allowed to file objections against you getting a license. And guess what? They typically do. The government then, once an objection is filed, decides whether there is a "public need" for a new moving company. How do you determine this? Nobody really knows. The statute does not explain. No regulation or case law defines the terms. It turned out that between 2007 and 2012, 39 people had applied for licenses to run companies; 19 of those had received objections and every single objected application had been denied by the state, including license applications from fully qualified movers. One guy who had worked as a mover for 35 years before seeking his own license to start his own company was denied in a written opinion that said you are fully qualified but you would compete against existing movers; therefore, denied.

And we were very fortunate that Pacific Legal Foundation was able to secure a court decision declaring that unconstitutional, but that is certainly not the final word. Other courts have upheld these kinds of restrictions and there is no Supreme Court precedent on it since the 1930s.

These restrictions are costly. In fact, to prove that there needs to be a new moving company you were required to hire an attorney to attend this hearing. You are not allowed to represent your own company. There are restrictions on economic freedom that do not protect the public, often on their own terms and are unnecessary.

In my written testimony, I explain some routes of what the Federal government could do to protect economic liberty more than a new federal civil rights legislation which is badly needed to protect the right to earn a living; using Congress's spending power to require states to respect the constitutional right to earn a living, a right Supreme Court Justice Douglas once called "the most precious liberty that man possesses."

Thank you very much for this opportunity.

Chairman HANNA. Thank you.

Our next witness is Patti Morrow. She is president of Interior Design Protection Consulting, a public affairs firm that assists small businesses in fighting state occupational licensing laws for interior designers. Prior to starting her firm, she owned and operated her own interior design business in New Hampshire before moving with her family to Greer, South Carolina.

Thank you for being here, Ms. Morrow. You may begin.

STATEMENT OF PATTI MORROW

Ms. MORROW. Good morning, Mr. Chairman, and members of the Committee. Thank you so much for allowing me to speak here today.

Like many other interior designers, I entered the field as a second career. In 2004, when my children were 10 and 13, I enrolled in a two-year program at the New Hampshire Institute of Art. It

was an interior design program. There were about 25 women in the class and we were all second career changers.

As I was nearing the end of the interior design program, a licensure bill was introduced in the New Hampshire legislature. If enacted, this bill would have destroyed my dream of having my own interior design business. In order to legally practice, I would have had to go back to school, earn another four-year bachelor's degree in interior design from an expensive, privately accredited college. Well, number one, there were no such schools in New Hampshire. And then not only that, but since I was going part-time it would have taken me about eight years before I could have completed that program. Also, I would have had to pass the burdensome NCIDQ (National Council for Interior Design Qualification) exam. This exam has historically had a less than 40 percent passage rate for all three sections taken at the same time, and it can cost over $2,000 to take once you consider the cost of the exam, the cost to travel to take the exam, and the cost of study materials. I would have also had to complete a lengthy internship under one of these NCIDQ-certified designers. Well, there were only 25 in the whole state and there was really no guarantee that even these 25 wanted to or were financially able to hire an intern. This bill would have put not only me but most of all of the other interior designers out of business in that state.

And why? Well, the bill claimed it was to protect the public, but I was not buying that. So I did my own research. And do you know what I found? There is not a shred of evidence to warrant a conclusion that the unregulated practice of interior design places the public in any form of jeopardy. In fact, 13 state agencies have already looked at this issue, they issued reports, and without exception, every single one concluded that interior design regulation would not add anything to protect the public beyond measures that were already in place.

Since 1907, only 52 lawsuits have been filed against interior designers in the entire country. That is over 100 years, and nearly every single one of those involved contract disputes, not safety issues. That New Hampshire bill had nothing to do with the public good but had come about solely through the efforts of industry insiders who were asking the legislature to eliminate their competition and grant them a monopoly.

I was not going to just sit back and let this small interest group dictate who could and who could not practice interior design. So I organized a grassroots group of interior designers. We attended the hearing. We testified against the bill and we soundly defeated it in March of 2007.

Then two years ago I moved to South Carolina, and it was déjávu all over again. In the last two years, I have had to travel to the state capital multiple times to meet with legislators, to testify at hearings, all this time taking time away from my business. As of right now that bill has been tabled, but for how long?

Licensing interior designers is a job killer. For the last eight years, because I am passionate about this, I have been helping interior designers all over the country protect their right to practice. Eighty percent of interior designers are small business owners. Forty percent are sole practitioners. Eighty-four percent of interior

designers who are practicing do not have a degree in interior design, and licensing disproportionately excludes minorities and second career switchers.

If there is a happy ending to this story it is this—since 2007, over 150 state bills which would have expanded or enacted new interior design regulations have been defeated. But like zombies they just will not stay dead.

In conclusion, Mr. Chairman, members of the Committee, let me just say that when Barack Obama was elected president, he did what many other presidents did before him—he redesigned the living quarters of the White House. Now, the District of Columbia does have full-blown licensing laws for interior designers. But who did he hire? He hired Michael Smith, an unlicensed designer from California to do this work.

Now, I submit to you if the most protected person in the entire world can hire an unlicensed interior designer, should not everybody else be able to?

Thank you very much.

Chairman HANNA. Thank you. You are welcome to move to New York anytime you like.

For the next witness I yield to Ranking Member Meng.

Ms. MENG. Thank you. Actually, New York, the state laws for interior designing are more lax, so I welcome you, too.

It is my pleasure to introduce Professor Rebecca Haw, a law professor at Vanderbilt Law School. She is a specialist in antitrust law and is focused on changes in professional licensing. She has recently released an article focused on licensing and the Sherman Antitrust Act. She was previously a fellow at Harvard Law School and also clerked for Judge Richard Posner on the U.S. Court of Appeals for the Seventh Circuit. She has degrees from Yale, Cambridge University, and Harvard Law School. Welcome, Professor Haw.

STATEMENT OF REBECCA HAW

Ms. HAW. Thank you, Chairman Hanna, Ranking Member Meng, and members of the Subcommittee. Thank you for inviting me here today.

To someone who studies antitrust, the state of professional licensing in this country is shocking. Licensing requirements are created mostly by boards that are dominated with competitors. They get together and agree on how many competitors they will face; they agree on who those competitors will be. Essentially, these boards are cartels with one important and dangerous exception—they are much more powerful. They do not have to worry, as most cartels do, about entry from competitors; they control that entry. They do not have to worry about cheating on the cartel since their rules are backed by the police power of the states.

Since states have basically given professionals the reigns to their own competition, one should not be surprised that self-dealing results. Yet, some of the licensing restrictions are shocking as my fellow panelists have illustrated.

I want to speak a little bit about what the economists have said about licensing because that is just as shocking as some of the restrictions we have heard about today so far. Economists say that

licensing is huge and it is getting bigger. It used to be in the '50s that one in 20 people needed a license to legally perform their profession; now that number is more like one in three. And licensing tends to raise prices to consumers. So, for example, in some states, dentists must hire a maximum of two hygienists. This is at the peril of losing their license. In states where the number of hygienists that may work with a dentist are restricted, dental exams are 7 percent more expensive. Economists have estimated that this results in hundreds of millions of dollars that every year could be in consumers' pockets.

Consumers, of course, are not the only ones who lose out. Licensing makes it impossible for many would-be practitioners to enter the market, effectively reducing their wages and deterring entrepreneurship.

But is licensing a bad thing? Certainly, not all licensing rules are harmful. Some improve service quality and public safety enough to justify the costs. These are the licensing restrictions that tend to solve the information issues and other problems that make a totally free market for professional services dysfunctional.

But there is a lot of economic evidence that many licensing restrictions have no effect on service quality. And the way that professional licensing is currently done through practitioner-dominated boards with the fox guarding the henhouse, no one has the tools or incentives to balance licensing's economic costs against its benefits.

Here is where I see a role for federal law. Federal antitrust law as it exists now is designed to balance these economic considerations, and there are many antitrust precedents striking down similar restrictions when they are passed not by a board in a licensing context but by purely private cartels. Antitrust law could be a powerful tool against the excessive of state-level licensing. But most jurisdictions have interpreted the antitrust statutes to shield licensing boards from antitrust liability. The law here is complex, and I would be happy to go into it in the questions, but suffice it to say that most courts have allowed licensing boards to operate immune from antitrust liability and that has meant carte blanche to regulate to their own benefit at the expense of the consumer and the excluded professionals.

But last year, the Fourth Circuit became the first appellate court to deny a licensing board immunity and to declare that one of its licensing restrictions violated the Sherman Antitrust Act. That created a circuit split, and the Supreme Court will review the case next term. It has granted cert in that case. I feel strongly that the court should affirm the Fourth Circuit's opinion and make it clear that because of the self-dealing that inevitably happens when you give competitors the reigns to their own competition, practitioner-dominated licensing boards should have to answer to the Sherman Antitrust Act, and that is because I think antitrust is not only an appropriate but the best way to balance the economic costs and benefits of licensing restrictions.

Thank you.

Chairman HANNA. Thank you.

Mr. Sandefur, part of what has not been talked about today is the effect this has on the growth of government. I am assuming

that for every license there is someone behind a desk someplace that is managing the testing, the whole process through that. Can you, anyone, give me an idea of how you feel that affects the overall growth and scope and cost of government?

Mr. SANDEFUR. Yes. Thank you very much, Mr. Chairman.

The public choice economics predicts that when existing firms have the opportunity to inflict burdens on entry and impose costs on their potential competitors, they are going to exploit that opportunity whenever it is worth it financially for them to do so. And so what you find is not only do licensing agencies employ a lot of people—inspectors and so forth to make sure that people are complying with these laws and running sting operations and things like this, but you find that existing firms will also waste their money in policing their rivals. They will watch what the other firms are doing or potential competitors are doing with money that could be spent on helping consumers and producing a better product.

As I mentioned sting operations, we see police departments setting up sting operations for unlicensed movers in order to arrest people for running a moving company without a license when these police officers could be out there actually solving real crimes. And these kinds of costs, if you put them together and consider what they are nationwide, they must be tremendous. But I do not know of any actual numbers that have ever been done on that.

Chairman HANNA. Ms. Haw?

Ms. HAW. Yeah, I have something to add to that. I absolutely agree with everything that Mr. Sandefur has said, but also I think the real question is how does this affect the scope of regulation, not so much the scope of government, because to me these boards are not government; what they are is a bunch of private competitors getting together to agree on entry and agree on rules. So what I am worried more about than the expansion of government is the expansion of regulation in this area.

Chairman HANNA. Thank you very much.

Let me ask you a bit—or anyone who wants to answer this—but implicit in all of this is that somehow there is some public good attained. And we have something called "free enterprise" that clears cut its own market. Bad actors get in, people find out about their reputations, good or bad, they grow or leave the market. So the assumption under all this to me is that somehow government intervention improves that process, keeps people out who otherwise should not be in and helps people enter the system who are somehow better or likely better at whatever it is they want to do. I do not buy that personally, but I am interested in how you feel about it, Ms. Haw. How you feel about letting the market be the market versus—things like Angie's List, et cetera—versus government trying to figure out that market in advance of free enterprise doing it on its own.

Ms. HAW. So economists tell us that there are two possible reasons why a free market for professional services will not work, and that is information asymmetries, which means that I as a consumer have less information than I really ought to have in purchasing a service. And then something called externalities, which means that when I purchase this service and it turns out badly for

me, I am not the only one who suffers. So this is why we license engineers. So if I purchase engineering services to build a bridge and that bridge collapses, well, maybe I got a cheap engineer, maybe I got low quality service, but the real problem is that I do not internalize the cost when it collapses.

So what this suggests is that a licensing restriction needs to address only serious problems of externalities and information asymmetries. When we think about professions like interior design or hair braiding, we have a lot of information about these services with the advent of things like Angie's List and other services on the Internet, and it is hard to imagine a really terrible externality story where if you did not like the decorating that you had done to your house or you were not happy with that particular hair service, it somehow proves to be a disaster for society. So certainly, I think there are some professions that ought not to be licensed, and even within the professions that ought to be licensed for the reasons that I said, sometimes they go too far.

Chairman HANNA. Mr. Sandefur, that is an interesting outline of where the limits begin I guess for you. And what would you say to that?

Mr. SANDEFUR. First, the problem with the information asymmetry argument in favor of government regulation is that it presumes that the government has more information, which it generally does not. Government officials do not know how to run a moving business, for example. So what the government agencies then do is they then recruit existing firms to give them that information in theory, and that is just what leads to the antitrust problems that Professor Haw was talking about, is that then these entities get taken over by the industry in the name of getting the kind of information to protect the consumer. And, in fact, information asymmetry problems can be solved better by private certification routes and private review alternatives, like Yelp or Angie's List and so forth.

As for externalities, externalities are taken care of by health and safety regulations that are routine already that say anybody doing this business, whether you have a license or not, if you hurt somebody you are liable for that. Plus, the information asymmetry and externalities, those are not the only two considerations. The more important and usually ignored consideration is rent seeking, that is the exploitation of government power by established firms to exclude their competition. And this all sounds all very technical and economic and modern but it is actually very old, and it goes back to one of my favorite cases in the law, a case called "The Case of the Upholsterers." Now, Ms. Morrow was talking about licensing of interior decorators. There was a case about licensing of interior decorators, in I think it was 1615, called "The Case of the Upholsterers" where there was a law that said you could not practice upholstery without permission of the Upholstery Guild. And it was challenged in court, and one of my great heroes, the Judge Sir Edward Coke, declared it unconstitutional under the British Constitution. He said, "No skill there is in this for a man might learn it in six hours." And people said, "Well, but it protects the consumers." And he said, "Unskillfulness is sufficient punishment." That is perhaps my favorite line from any court opinion. "Unskill-

fulness is sufficient punishment." If you are bad at your job, people will not hire you. They will not shop from you. That is a far better protection of the consumer than creating a government apparatus that gets taken over by established firms who use it to exclude competition, hurt consumers, and bar entrepreneurs who need economic opportunity.

Chairman HANNA. Although government may be the one place where you are protected when you are not good at your job.

Mr. SANDEFUR. Or with government power. That is right.

Chairman HANNA. Thank you.

Ms. Armstrong, you mentioned that there are hundreds of people who become independent, become entrepreneurs, have that sense of pride. Maybe give us a couple cases, because at the end of the day, that is what this is all about, unleashing the energy, the enthusiasm, the entrepreneurial nature of human beings to become self-reliant, to be able to engage their own juices and their own success. And government is holding that back. Your own story is remarkable. I give you a lot of credit, but other people who you know, maybe one or two examples for the Committee.

Ms. ARMSTRONG. Sure there is Nina Lyons. And Nina Lyons, when she graduated from high school wanted to be a professional hair braider but learned quickly that without the cosmetology license she was going to not be able to do that. And so she chose instead to go work in a factory. I happened to meet Nina Lyons around about the time this was all taking place, and after the law was passed, she then came out of the factory, not wanting to be there anyway, and came and worked in my salon. And she is a very talented, gifted hair braider. And so she was able to pursue what she had wanted to pursue 20 years prior.

There is also Loveeta Warren. She is down on the coast of Mississippi, and she owns a braiding salon called Braid Baby. As a matter of fact, she had opened a second location and this is something that as a result of the law being passed enabled her to be able to do this.

Chairman HANNA. These are taxpayers. I mean, these are the people we need.

Ms. Morrow, do you want to add anything to that? I wonder, implicit in all this regulation is somehow somebody is being protected. Maybe you would like to push back on that, if you want to. Because the suggestion is somehow there is bad interior designers out there creating ugly homes or something; I do not even know. But is there any reality in any of that?

Ms. MORROW. Well, to paraphrase Oscar Wilde, "No one ever died over the wallpaper." And there is no evidence whatsoever that unregulated interior designers are harming the public. There are three states that actually have full-blown licensing laws, and this is after more than 30 years of the proponents trying to get licensing laws. And after all that time there is only three states. There was a fourth one. Alabama's was struck down, declared unconstitutional. If interior designers were being harmed or killed, certainly, we would have laws in far more than three states. The 47 states that do not have licensing would at least have some. And the licensing laws, the bills that are introduced, you would not believe how far-reaching they are.

I will just read you a couple of things that if you do not have the right credentials, you cannot do designs, drawings, diagrams, studies. You cannot consult with clients. You cannot offer space planning. You cannot recommend furnishings. You cannot draft contract documents. You cannot research or analyze a client's requirements. How do you do interior design without those things? You could not even give customers a recommendation as an employee of Home Depot if some of these laws were to pass.

Chairman HANNA. Ms. Haw?

Mr. SANDEFUR. And for me, add to that, Mr. Chairman, that a lot of these laws are backed up by criminal penalties. Is that the case in your situation?

Chairman HANNA. You can be jailed for bad floor design or something like that?

Ms. Haw, so to get this straight, more harm is done with these laws than without them. Can we say that in certain cases? And I am interested. You seem to have a pretty clear idea of where you would draw the line in terms of who should be licensed and who should not. I think all of you probably do to some degree. Could you generalize that? I mean, at what point would you would say, or maybe there are a couple of industries that are examples, but—go ahead. What do you think?

Ms. HAW. So this is why I think antitrust is such a great tool for this particular question because to me it really is an economic argument that the markets fail. And if the markets fail, then maybe we need regulation and maybe we need licensing. So if we back it up and we ask the question to begin with, is a free market in this area filing, I think you will find that for a lot of the currently regulated professions that is not true. I think you will find for the professions in which a truly free market may fail, a lot of the restrictions go too far and they address market failures that are not there.

So the question that I would ask is, is this the kind of industry in which we are likely to see a lot of information asymmetries? Is this the kind of industry in which we have a big problem with externalities? Then the second question would be, does the restriction that we are considering, not just licensing generally but this particular licensing restriction. So let us say you want to license dentists. Well, how many hours of schooling are you going to require? What level of education are you going to require? What is the exam going to look like? Every one of these questions should be answered with the market failure in mind, and it should be allowed only if that particular regulation addresses that market failure.

Ms. MORROW. Mr. Chairman, the free market works very, very well in the interior design industry. Consumer are very savvy these days. They have many means to investigate the qualifications of interior designers, and not only that but there are many private organizations that do different credentialing. And if an interior designer wants to be distinguished from his or her peers, they can certainly take one of the exams and after it is passed they can market those credentials, and if they get the job based on that, then they have put that work into their own career.

Chairman HANNA. People build a body of work, they build a reputation in the community they live in, and people can decide to hire them or not.

Ms. MORROW. Exactly.

Chairman HANNA. So the fundamental piece of this is, is government better at deciding who you want to have as an interior designer or are you in your own market? And clearly, failure clears out the market that the government is assuming it is doing by not licensing certain people but may in fact be limiting competition in a way that could actually encourage less qualified people who are able to get over those hurdles to have access where people that are equal might not. Is that fair, Mr. Sandefur?

Mr. SANDEFUR. Yes, Mr. Hanna. I almost called you, Your Honor.

Yes, Mr. Chairman, that is exactly right. And the Supreme Court has made clear in every decision on this issue that restrictions on entry into a trade must be related to a person's fitness and capacity to practice the trade of profession. The first Supreme Court decision on the constitutionality of occupational licensing laws was Dent v. West Virginia in 1883. I think it was about medical doctors. And that was written by Justice Steven Field, who declared that licensing laws on the entry into a profession are constitutional if they are related to the trade and they are attainable by reasonable study and practice. But otherwise, they would violate a person's constitutional right to earn a living.

The most recent decision on the question, Schware v. Board of Examiners in 1957, struck down the effort of New Mexico to bar members of the Communist Party from practicing law. And the Supreme Court again said licensing laws can be used to protect consumers but they must rationally relate to a person's fitness and capacity to practice the profession. Unfortunately, I mentioned the Certificate of Public Convenience and Necessity laws for the moving laws have no relationship whatsoever, even on their own terms, to a person's capacity to practice the business of moving. They are written in such a way as to deny qualified movers the opportunity to enter simply because there are already enough movers in the minds of bureaucrats. Now, how do bureaucrats determine how many movers there ought to be in a market? They do not even do consumer assessments or research or surveys or anything. The entrepreneurs often do but that is not enough to persuade the bureaucracy. And a lot of these laws are written in very vague terms.

Nevada, their licensing law for movers is the most anticompetitive licensing law in the country. It says you can only practice the trade of moving if it would "foster sound economic conditions." What does that mean? Well, last year I was at a hearing in front of the Nevada State Senate Transportation Committee. The head of the Department of Transportation was asked, "What does that mean?" And he said, and I quote, "You know it when you see it."

Now, that kind of discretion in the hands of bureaucrats means it is going to restrict opportunities, it is going to raise prices, it is going to availability of services, all solely for private interest of those politically powerful movers who do not want competition. It is unconstitutional and it is unfair.

Chairman HANNA. Thank you. I appreciate your indulgence in me, Ranking Member Meng. Thank you.

Ms. MENG. No problem.

Piggybacking off that question, and anyone is free to answer, much of the application of antitrust law and licensing cases falls on whether the licensing board is an entity of a state. Can you please explain how the makeup and structure of various licensing boards could be changed so that antitrust law would apply to them? And how could simply reforming the structure of a board help entrepreneurs gain access to more occupations?

Ms. HAW. Well, I actually think that the way that boards are currently comprised as they are right now, in most cases they are subject to antitrust law. So this is where we get into the controversy that is at play in the Supreme Court case, the North Carolina State Board of Dental Examiners.

So most boards—we did some research into boards in Tennessee and Florida—are dominated, which means there is a majority of members holding seats on the board, are of the profession, licensed people of the profession. I think it is 93 percent in Tennessee and in Florida it is 90 percent of boards are this way. Under a correct interpretation of the state action immunity that I referred to, those boards should be subject to antitrust law. This is what I believe from my research. It is what the FTC believes, and now a circuit court has decided that. What we need is a Supreme Court case to come in and say these boards, as they are currently comprised, are subject to antitrust liability. So you would not need to change the way the boards are organized in order to get that antitrust liability.

Now, likely, if the boards as they are comprised now start seeing more antitrust suits when these floodgates open, as they would in the case of we got a favorable decision from the Supreme Court, it may be true that the states will alter how they do their regulation. They may actually change the composition of those boards, and to my mind that is a good thing because what they would have to do is they would have to remove—at the very least they would have to remove that majority on each board of the practitioners.

Ms. MENG. Besides the legal and health fields, what are some of the most common licensed professions that you have seen around the country that are overregulated? Where can states ease regulations in some of these fields?

Mr. SANDEFUR. It is hard to answer what trades are the most commonly regulated because you find that typically all the states impose regulations and then there are some that are contentious, like florist is only in Louisiana, and then there are varieties of licensing requirements, like with interior designers. It is only a violation of your First Amendment rights and not of your Fourteenth Amendment rights. That is, it only says you are not allowed to call yourself what you are but you are still allowed to do that practice, for example.

So it is hard to answer that question, but industries like, in my business running the Economic Liberty Project at Pacific Legal Foundation, we have focused a lot on the moving industry because this is an entry-level industry that has low startup costs, it is a great opportunity for people who do not have much work experi-

ence or education, and yet they are licensed in the same way that natural gas pipelines and railroads are licensed, which is absurd. And that is in, as I said, 22 states in this country regulate the moving industry in that way. And then there are lots of cities and counties that impose similar kinds of regulations.

I think the way I would answer your question is that the Certificate of Public Convenience and Necessity law for ordinary competitive markets should be abolished entirely. There is no rational justification for allowing existing firms to veto their own competition in a perfectly normal competitive market like moving or taxicab operations. Or these laws even apply to hospitals. If you want to start a hospital, you cannot start a hospital if the existing hospitals do not want you to. Or buy medical equipment. We are talking about people's lives now.

The island of Maui a few years ago, it only had one hospital operating on the island run by the state, which meant if you were injured far away from that hospital, you would have to endure a long ambulance ride to the hospital. So some people got together and said let us start a second hospital. The state denied them a certificate of need to open a new hospital for several years. It has since been granted. But when you consider the fact that in an emergency every second counts, that means that it is very likely that there is somebody who is dead today who would not be dead if the state of Hawaii had not decided that it was more important for them to prevent economic competition against their state-run hospital.

So my answer to you would be that the Certificate of Public Convenience and Necessity law should be radically scaled back or abolished entirely, and the Federal government can do that either as a condition of spending costs budgetary matters or through federal civil rights legislation, which as I said, is sorely needed in this area. The first federal civil rights law in 1866 was primarily focused on protecting the right to contract and the right to private property, and we have lost sight of the importance of those rights in just the past few decades. And I think it is really important for Congress to consider that that hurts precisely those minorities who most need that civil rights protection.

Ms. HAW. So Mr. Sandefur provides some shocking testimony there, and I can shock it maybe in a different way.

So there are 1,100 different professions that are licensed in at least one state, and I could be here for the rest of this hearing listing these but I will just give you a few.

Locksmiths. This means it is illegal to do this unless you have a government-issued license. Locksmiths, beekeepers, fortune tellers, tour guides, shampooers. This list goes on and on.

Mr. SANDEFUR. Fortune tellers. Even though it is literally impossible to be a competent fortune teller.

Ms. MENG. I think we need to have another hearing to determine if that is true.

Just to play devil's advocate, in New York City, many areas, for example, you talk about moving companies. We have heard lots of stories where moving companies will sort of prey on people within certain communities. They will come and move and steal people's furniture so people never see them again. They will park, taking up parking spaces, and there is no way to contact them or to hold

them accountable, parking illegally. And so how do you balance the interest of consumer protection overregulating moving companies, for example?

Mr. SANDEFUR. The reason I am smiling is not because that is a bad question but because I am actually in a dispute with my moving company which just started yesterday, and it is quite tense for me and stressful, and I am having to deal with this exact problem myself. And there are perfectly normal remedies. I could have hired a different company. I can review them badly on Yelp. I can sue them if they break or steal my things. We can call the police department if they steal my things, and so forth and so on. There are plentiful regulations. You are never going to have a regulatory system that will stop all harm. And these Certificate of Public Convenience and Necessity laws have no connection to that.

It is true. You have to satisfy the bureaucracy that you would comply with the law in order to get a license, but that does not prevent you from breaking the law if you choose to. So these kinds of laws are not effective at protecting the public, and protecting the public is more effectively, although not perfectly, done through other avenues of the law.

Now, as far as New York City is concerned, you are almost certainly aware that in the 1930s the city of New York capped the number of taxicab licenses at I think it is something like 30,000, 13,000. I do not remember the number. Anyway, capped the number of available taxicab medallions so that today there are many cabs or fewer almost in New York City than there were in the 1930s so that today a medallion to operate a single taxicab in New York City costs a million dollars. Now, it is not rich white guys driving taxis; right? So if you want to run a taxi company, what you have to do is lease your license from the few wealthy people who are able to afford them. And that means that you are working from Monday until Thursday or so to pay off the hundreds of dollars a week that you have to pay for the lease of the license on your taxicab and then you get to keep the money that you earn otherwise.

Is it any wonder that these licensing laws, not only do they harm the poor and entrepreneurs, but they push people into the underground economy or even deter them from getting a job in the first place because it is just too hard and they cannot imagine themselves getting that.

Ms. MENG. Several states have begun to offer better reciprocity between their licensing regulations to enable workers to start working immediately following moving to a new state. This is especially beneficial for military families. Besides offering portability to increase worker mobility across state lines, what else can be done to reign in licensing laws?

Mr. SANDEFUR. Well, I would say that legislation that makes clear—I would suggest something modeled on the Religious Freedom Restoration Act or the Religious Land Use and Institutionalized Persons Act that would say that restrictions on the right to earn a living must satisfy a high threshold for constitutionality. Another one would be what is being called sunrise legislation. It is similar to sunset legislation. Sunset legislation says a bill will expire unless it is renewed. Sunrise legislation says to the legislature

you have to satisfy these standards in order to impose a new licensing restriction.

There is a bill like this in Missouri right now. I just testified in a committee there just a couple weeks ago. And they are not binding. They do not actually prohibit the legislature from restricting or imposing a new licensing restriction, but they include certain factors that have to be proved before the legislature will impose these restrictions. And there are significant ones. They say prove that there is no free market alternative available, and so forth and so on. I think those are good ideas for reform.

Ms. HAW. What I would like to see is the correct interpretation of the State Action Doctrine prevail in the Supreme Court. And what that would mean for probably around 90 percent of boards in the U.S. is that they would be subject to the antitrust laws and would have to balance the anticompetitive effects against the procompetitive effects.

Ms. MENG. Thank you. I yield back.

Chairman HANNA. A couple of quick questions.

What do you think this costs the economy in terms of job creation? We have an example. A relatively small community of hundreds, right, and in general, job creation—anybody? You have talked to economists, Ms. Haw, maybe——

Ms. HAW. Yeah, you know, I know that—so some of the figures that float around are licensing costs $100 billion to consumers. That does not directly address the question of job creation but it is going to be related to that; right? So another statistic that I think is relevant here is licensing tends to raise wages for the incumbent professionals. The figure used to be 10 to 12 percent. Modern day to now says more like 18 percent. So if we want to think about that as how it would affect job creation, you can think about that as raising the minimum wage or something. There are only so many places these dollars can go. So that is going to constrict the labor supply as well.

Mr. SANDEFUR. It is really impossible to answer that question any more clearly than that because of what economists call the "broken window fallacy." The kind of costs that are being imposed by licensing restrictions are in the form of jobs that just never appear. So how do you measure that? How do you measure the number of people who say, oh, I would like to start a moving company but it is impossible to get permission so I am not going to. And it is impossible to measure that.

The reason it is called the "broken window fallacy" is it comes from an old story about a baker who arrives at his work one day to see that somebody has shattered his window in the middle of the night. And as he is sweeping up the glass, a friend says to him, "Well, do not worry. It is good for the economy because now you will buy a new window to replace the broken window." Well, that is nonsense because he was going to spend that money on a new coat, and then he would have had both a window and a coat. But now he only has a window. What you never see is the unseen cost of this vandalism is the coat that is never made and never appears.

And so what we have with economic restrictions like licensing laws is how do you measure jobs that are never created, or the innovation that might have occurred. The hair braiding is a great ex-

ample of this because licensing boards define the scope of their practice as broadly as possible to protect themselves from competition. Well, an entrepreneur comes along and says, well, you know, I am not going to be a barber. I have got an idea. I am going to just braid hair. Well, then the barber and cosmetology board says, "No, no. You have to have one of our licenses." Now, this is an innovative new business model. This is a new idea for a business that has never been around before but is being forced into this category of barbering that it really was not designed for it and was imposed decades ago.

Well, we do not know the kinds of costs in terms of innovation and creativity that these licensing restrictions impose. It is literally incalculable.

Chairman HANNA. Well, what we do know from Ms. Morrow and Ms. Armstrong is that there are literally thousands of people who are held back from doing what they want to do because of restrictions, barriers to entry that are so burdensome, either do not try it or they try and they quit. We know that within that, that lack of competition by its nature is a cost push. Clearly no one would be interested in limiting the number of moving companies if it were not something they thought moved to their own bottomline.

Mr. SANDEFUR. That is right. And you could try to measure the costs of these licensing restrictions by measuring how much time and energy the existing firms put in to restricting their possible competition. In the interior design field, they put in millions and millions of dollars to try and obtain licensing laws that will restrict entrepreneurs from competing against them. In the moving industry the existing firms would hire lawyers and spend hours in the process of the hearing and filing objections and these sorts of things in order to block competition. So you could measure those kinds of costs and say that that is more or less the cost of the license.

Chairman HANNA. If someone is going to tens of thousands of dollars to keep someone out of their business, you can be darn sure that it is for a reason.

Mr. SANDEFUR. That is right.

Chairman HANNA. And it is profit.

Yes, ma'am.

Ms. MORROW. Mr. Chairman, in the interior design business, it is one national trade association that has spent allegedly $8 million trying to get every state regulated. And not only that but this same trade association, they created the exam that you have to take and then spun it off and they created the accreditation for the colleges that you would need to take, spun that organization off. So there are these three organizations that have been working together for over 40 years to regulate the whole industry. We call that a cartel.

Chairman HANNA. Sure. Sure.

Ms. HAW. We do, too.

Chairman HANNA. So these manufactured requirements by people who are already in the industry are designed to keep other people out of whatever that is, raise prices, limit competition, limit job creation.

What about innovation? I mean, what do you think of that? I mean, that is just a though.

Ms. HAW. So Mr. Sandefur brought this up a minute ago, and I think that is absolutely right. So you are seeing a lot of this activity on the part of established boards of broadening the definition of what their practice is. And this, of course, is going to stifle innovation because any time you come up with a new business model that is to the side of a profession, suddenly you might find yourself receiving a cease and desist letter that says, "Oh, no, no. That is in our profession."

So we are seeing this with teeth floaters. I guess horses teeth do not naturally wear down and so you have to file them. And it has traditionally been done by, you know, relatively low level of education, just sort of you learn how to do it from your family business-type thing. Well, suddenly, veterinarians have decided that this is part of veterinary practice and cannot be done unless you have a veterinary license which, of course, as we know, is many, many years of education and passing an exam. And guess what? They do not teach horse teeth floating in vet school.

So the case that is actually before the Supreme Court is about teeth whitening. So it was the Dental Board of North Carolina saying, "Oh, teeth whitening in all its forms is part of dental practice."

So as you see, the definition, not just more and more professions coming under licensing, but the established licensed professions becoming bigger and bigger, you are going to be able to see less innovation on the margins of those professions.

Chairman HANNA. My sister was a farrier and did that often, filed teeth. And you are right. They just grow forever. They are like rats.

So free markets work best. Consequences of what we are describing here today are good and bad. There are good and bad outcomes. But markets have a way of dealing with that. People do not need the government to tell them every little thing they need to know about who they are hiring. And like you said, in terms of moving vans in New York City, just because you have a license does not mean you are not a thief, no more than it means you are not good at what your job is. So with that, unless—we have a little time if anyone would like to——

Mr. SANDEFUR. I do have one other point I would make in terms of economic costs, and that is what economists call the "Cadillac effect." The "Cadillac effect" is when government regulation makes it such that you can buy a Cadillac or nothing at all. Right? A restriction that says if you want a car it must be a Cadillac. And that is often what happens in terms of regulation of professions that say if you want to hire a lawyer, it has to be a lawyer who has gone through this many hours of continuing legal education. Or if you want to hire a hair braider, actually, you have to hire a barber. And this prices people out of the market and that is what causes a lot of black market problems.

Chairman HANNA. Would you like to comment on Tesla?

Mr. SANDEFUR. Or UBER are other examples of the recent headlines in which new and innovative business models have been excluded from the market by really obsolete licensing restrictions for taxicabs or car dealers.

Ms. HAW. Yeah. And can I just say a lot of the stuff we talked about today is kind of shocking but it is also completely mundane. If you asked competitors, "Who do you want to compete with?" they are going to say as few people as possible. If you are going to ask dealers, you know, do you want Tesla to direct market their cars, they are going to say no. So on the one hand this is all surprising; on the other hand to me it seems really unsurprising.

Mr. SANDEFUR. And it is not new. I mean, I mentioned the 17th century cases. Lord Coke, when talking about licensing laws, said that the people who advocate for licensing laws are like a man rowing a boat. They look one way but they row the other. They pretend public benefit but intend private.

Chairman HANNA. You are a man without lack of anecdotes.

I want to hit one other theme because I think it is very important. And that is that minorities and women who—I have friends who sell Mary Kay. You have friends who do braiding and other things. These are cottage industries that can be done within the confines of someone's existing lifestyle if they can find the time. If they have children, stay-at-home mother. So, I mean, I find it compelling that in your case, Ms. Armstrong, that people are able to become independent through being entrepreneurs and able to probably stay home with their children while they do this. The same with you, Ms. Morrow. So we are really hurting a class of people, women and minorities—and I will just throw this out there, if you can confirm it or not—it disproportionately affects people trying to manage in let us say marginal circumstances, that we have an opportunity to help them be transcendent and through these licensing laws we are actually hurting the people we are pretending to help in some cases with these laws.

Any comment about that?

Ms. MORROW. Yes. And you really hit on something because that is one of the main complaints that the cartel uses. They say anyone can hang out a shingle and be an interior designer. And yes, in 47 states that is true. But, you know, as I said before, consumers are very savvy and the needs of the person who is practicing are different, too. And you have the person who wants to do a lower level of design and you have the person who wants to do a hospital. And the thing is the person who is responsible, the administrator of the hospital is not going to hire the person who hung out their shingle yesterday. They are going to very vigorously vet the interior designer who is going to design.

So there are different levels. And there are consumers for all levels. And if only the wealthy or only the big businesses could hire an interior designer, I do not think that is right. I think everyone should have good interior design. And it is such a diverse field that anyone can come into it. They can create their own little niche for customers that like what they are selling and, you know, for as many hours as they want to work and support their family.

Chairman HANNA. So free enterprise works best, government interference is often the law of unintended consequences which creates more dislocation and damage economically than it intends, and people use government to protect their own self-interests in a way that keeps others out, and in particular, in Ms. Armstrong's case and yours, stay-at-home moms and minorities and a whole

class of people that really are not in a position to climb over those hurdles that the government has thrown at their feet.

I want to thank you all for being here today. You have provided great input and done a wonderful job, all of you.

If there are on further questions, I ask unanimous consent that members have five legislative days to submit statements and supporting materials.

Without objection, so ordered.

That is it. Thank you.

[Whereupon, at 11:15 a.m., the Subcommittee was adjourned.]

A P P E N D I X

Testimony of Melony Armstrong

African Hairbraider

Owner of "Naturally Speaking" Salon, Tupelo, Miss.

Before the U.S. House of Representatives

Committee on Small Business

Subcommittee on Contracting and Workforce Hearing

Thank you, Mr. Chairman and members of this committee.

My name is Melony Armstrong.

It may surprise members of this committee to learn that, not too many years ago, the State of Mississippi demanded that I register my hands with the government.

No, I'm not a secret agent.

But my work has had a powerful impact in the fight for freedom.

Every day across Mississippi, hundreds of low-income families are housed because of my advocacy and hard work. But I don't run a shelter.

They are clothed through what I've done. But I don't run a second-hand clothing store.

They are fed as a direct result of what I have achieved and continue to achieve. But I don't run a soup kitchen.

I have transformed the lives of literally hundreds of poor women in my state of Mississippi not because I sought out government assistance for them; rather, because I demanded that the government get out of my way so I could provide for myself and for my family, and so other women around me could do likewise in peace, dignity and prosperity.

What I achieved and what each of these women is now achieving across the American Southeast is happening because of one simple fact: We demanded the government respect our economic liberty—the right to earn an honest living in the occupation of our choice free from unnecessary government regulation.

I am an African hairbraider.

And if a lone braider in Tupelo, Miss., could have such a transformative impact helping to change the law to free so many around me to earn an honest living, imagine what could happen across our nation if state and local governments followed that example.

Not every entrepreneur is a Bill Gates or a Henry Ford. Some are and will remain more humble in the scope of their impact. But that doesn't mean the impact is not significant in the lives of those around them.

Imagine the creative forces that would be unleashed if government respected the rights of other would-be entrepreneurs who want to braid hair, or drive cabs, or sell flowers by the roadside, or pursue any of a hundred or more occupations that would otherwise be easy to pursue if only the government didn't needlessly stop entrepreneurs from doing so for no better reason than to protect the politically powerful from competition.

Each day, I work to demonstrate the power of one entrepreneur.

As my story demonstrates, the power of one entrepreneur can transform not only a life, or an industry or a community; the power of America's entrepreneurs can transform our nation.

African hairbraiding is a skill that has been passed from one generation of women to another for the past 3,000 years of recorded history. For the vast majority of those 100-plus generations, women like me have practiced this craft with no government oversight, with no government-issued license, with no government-imposed demands. We learned from the previous generations by doing, and in so doing, we were free to earn a living for our families.

But even with that history, to open my hairbraiding salon—Naturally Speaking—in Tupelo in 1999, was no easy task; it took not only persistence and hard work, it also took a lawsuit and lobbying. It took all this even though I wanted to practice an occupation that is perfectly legal and perfectly safe.

To get paid to braid hair, many states demand hairbraiders obtain a cosmetology license or other similar license—typically requiring up to 2,100 hours of coursework.

That is more than a year's worth of study, 40 hours a week taking classes from educational institutions that more often than not don't teach braiding in their curriculum.

Let me say that again: the government in many states requires would-be braiders to take thousands of hours of classes that have literally nothing to do with the trade they want to practice.

When I first opened my doors as a hairbraider, I had to earn a "wigology" license (yes, there is such a thing), which required 300 hours of coursework, none of which covered hairbraiding.

To teach others how to braid hair, however, which was my ultimate goal, the state of Mississippi required me to obtain a cosmetology license (another 1,200 hours of classes in addition to the 300 I completed for wigology), then a cosmetology instructor's license (another 2,000 hours of classes) and then apply for a school license—hours I could use more productively running my business, teaching others about braiding, volunteering in my community or nurturing my family. Again, none of the required instruction actually spent any time teaching the student how to braid hair.

In the 3,200 classroom hours it would have taken for me to earn a license to teach hairbraiding, I could instead have become licensed in *all* of the following occupations in Mississippi:

- Emergency medical technician-basic (122 hours plus five emergency runs),
- Emergency medical technician-paramedic (1,638 hours),

- Ambulance driver (8 hours),
- Law enforcement officer (400 hours),
- Firefighter (240 hours),
- Real estate appraiser (75 hours) and
- Hunting education instructor (17 hours).

And that would all take more than 600 hours *less* than obtaining a license to teach braiding.

The group that benefited most from Mississippi's regulatory regime was the cosmetology establishment. Practicing cosmetologists made up the State Board of Cosmetology and could set the bar for entry to their occupation high (and thereby keep competition to a minimum), and cosmetology schools enjoyed captive customers.

I was not about to submit to such naked economic protectionism. Instead, I decided to take on both the political establishment and the cosmetology regime, which had convinced lawmakers to limit entry into the trade.

In August 2004, I joined with two aspiring hairbraiders, who wanted to learn the business from me, and with the Institute for Justice—a public interest law firm that represented us for free—to file a lawsuit against the state to break down the regulatory walls barring potential entrepreneurs from entering the field.

In the months that followed, I took weekly trips to the state capital of Jackson (a seven-hour round-trip from Tupelo) working to convince legislators to change the law.

We didn't go to the government seeking a handout. Across the board, braiders are independent individuals who take great pride in providing for themselves and their families through their own handiwork.

In 2005, all of our efforts paid off: Mississippi's governor signed legislation enabling hairbraiders to practice their occupation without the burdensome government-mandated classes. The only requirement now are that hairbraiders must pay a $25 fee to register with the state and abide by all relevant health and hygiene codes.

It is rewarding to know that the influence of my work is felt beyond the Tupelo area. Since the restrictions were lifted, more than 800 women provide for themselves as hairbraiders, taking once-underground businesses "legit" and opening new enterprises in places where customer demand was once unmet. And because of the change in Mississippi's laws, aspiring braiders are moving here from nearby states, including Tennessee, Alabama and Arkansas.

One of the greatest benefits of our success is that it moves aspiring entrepreneurs from the "underground economy" into the "formal economy." In the underground economy, braiders are forced to operate off the books and out of sight of intimidating and sometimes ruthless regulators who are often out to shut them down to protect the status quo.

Regulators often don't care about people's dreams; they only care about enforcing codes, laws and regulations that justify their existence. And as they drive around, looking for the next "scofflaw" to shut down, those lawbreakers (who are nothing more than people

trying to work hard to support themselves and provide an otherwise perfectly legal service) must fear that next knock on the door, which could mean losing what they've worked for, paying steep fines and, in some cases, even going to jail for practicing their trade.

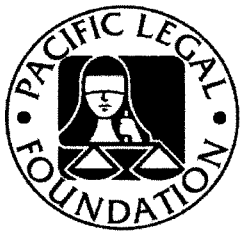
Freed from needless government-created barriers, I have now gone on to teach more than 125 individuals how to braid hair. No longer blocked from putting industrious individuals to work, I have employed 25 women, enabling them to provide for themselves and their families. For many of these women, the money they earn from braiding represents the first steady paycheck they have earned in their lives.

For years, the government tried to stop me from doing all this good—stop me from reaching my full potential and from helping others to do likewise through the dignity of honest enterprise. In too many states and in too many occupations across the country, these kinds of government-imposed barriers to earn an honest living still exist.

Thank you for holding this hearing to alert the public to this problem. I hope lawmakers in every state across the country are paying attention and will heed our calls to remove those laws that do nothing but prevent honest competition in trades from coast to coast.

Thank you.

Melony Armstrong is the owner of Naturally Speaking, a hairbraiding salon in Tupelo, Miss. For more information on economic liberty, visit: www.ij.org/PowerOfOneEntrepreneur.



"Testimony to the U.S. House Committee on Small Business"

by Timothy Sandefur

March 26, 2014

Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111

www.pacificlegal.org

Members of the Committee,

I appreciate the opportunity to contribute my testimony on occupational licensing and the burdens it imposes on the right to earn a living—a right that Supreme Court Justice William O. Douglas called "the most precious liberty that man possesses."[1]

Sadly, licensing restrictions have been abused for centuries by established businesses as a way to prohibit economic competition, enabling them to raise their prices while barring newcomers from the market. This harms consumers and restricts economic opportunity for precisely those who most need it. While these abuses generally take place at the state level, Congress has authority to protect economic freedom and secure the blessings of economic liberty for all.

In this statement, I will first discuss the constitutional and legal issues surrounding occupational licensure. I will then discuss the consequences of licensing laws for consumers and entrepreneurs, using as an example a lawsuit that Pacific Legal Foundation recently won in Kentucky, challenging that state's laws regulating the moving industry. I will conclude with a discussion of what Congress can do to protect the right to earn a living.

Economic liberty is deeply rooted in our constitutional tradition

The right to earn a living and to provide for oneself and one's family without unreasonable interference by the government is today the most neglected civil right in America. Yet this right has deep roots in our constitutional tradition. In fact, the right to earn a living was protected by English courts almost two centuries before the U.S. Constitution was written. In a series of decisions beginning in the early Seventeenth Century, English courts began striking down restrictions on economic opportunity that were imposed by the guild system—restrictions we would today call licensing laws.[2]

For example, in 1614, the Court of King's Bench struck down a law that required people to obtain a license before going into the upholstery trade. The licensed upholsterers claimed that the requirement was necessary to protect consumers against dangerous or incompetent practices, but Chief Justice Sir Edward Coke held that there was "no skill" required, "for [a person] might learn this in seven hours." If a person was bad at upholstery, "unskillfulness is sufficient punishment." Most importantly, a restriction on such a trade hurt the economy and limited people's ability to earn a living for themselves—not to protect the public, but to serve the private interests of licensees. "[B]y the...common law," declared Lord Coke, "it was lawful for any man to use any trade thereby to maintain himself and his family; this was both lawful, and also very commendable, but yet by the common law, if a man will take upon him to use any trade, in the which he hath no skill; the law provides a punishment for such offenders."[3]

A year later, he repeated the point in another case. "[A]t the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil," he wrote, "and especially in young men, who ought in their youth, (which is their seed time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade."[4]

Lord Coke went on to author the English Statute of Monopolies, which prohibited the government from granting exclusive trade privileges to established businesses. And in his retirement he authored a legal textbook, the *Institutes*, which became the leading instructional book for such law students as Thomas Jefferson, John Adams, and John Marshall. "[I]f a graunt be made to any man, to have the sole making of cards, or the sole dealing with any other trade," wrote Coke in the *Institutes*, "that graunt is against the liberty and freedome of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter (Magna Charta). Generally all monopolies are against this great charter, because they are against the liberty and freedome of the subject, and against the law of the land."[5]

The American colonies never had a guild system, and the right to economic freedom took on a special importance here. When, in 1775, Thomas Jefferson wrote his *Summary View of the Rights of British America*—prefiguring the arguments he would later condense into the Declaration of Independence—he included British restrictions on economic liberty as one of the colonists' complaints. British laws "prohibit us from manufacturing for our own use the articles we raise on our own lands with our own labour," he wrote. Americans were prohibited from making hats from the fur of animals taken in America, for example, in order to serve the interests of British hatmakers who did not want competition. Another law prohibited Americans from making tools out of iron, and instead required them to ship iron to Britain and back to have tools made—and all this "for the purpose of supporting not men, but machines, in the island of Great Britain."[6] When he wrote the Declaration, Jefferson described the right to earn a living as the right to pursue happiness—borrowing the phrase from his friend George Mason, who had referred in the Virginia Declaration of Rights to "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

The right to "liberty" and to the "privileges and immunities" of citizenship protected by the U.S. Constitution include the right to put one's skills and knowledge to work in earning a living. In a famous 1823 case, Justice Bushrod Washington explained that the "privileges and immunities" protected by Article IV of the Constitution include "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise...to take, hold and dispose of property...and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned...."[7]

When, after the Civil War, Congress drafted the new Fourteenth Amendment, they included a new privileges or immunities clause, which again was intended to protect—among other rights—the right to earn a living without unreasonable and unjust interference by the government. States, particularly in the south, were enacting arbitrary restrictions barring former slaves and immigrants from engaging in a variety of occupations, and the new Amendment promised them substantial federal protections. Representative John Bingham, principal author of the Clause, said that it included "the liberty...to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."[8] Another representative

echoed this: "has not every person a right, to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself, as long as it is a legitimate exercise of this right and not vicious in itself, or against public policy, or morally wrong, or against the natural rights of others?"[9] Senator John Sherman explained that courts interpreting the privileges or immunities clause would "look first at the Constitution of the United States as the primary fountain of authority," but also to the Declaration of Independence, American and English history, and English common law, where "they will find the fountain and reservoir of the rights of American as well as English citizens,"[10] including, of course, the common law cases protecting the right to earn a living free from government-created monopolies. In fact, as one federal court put it, twelve years after the Amendment became law, "it seems quite impossible that any definition of these terms [privileges and immunities] could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence."[11]

Despite significant setbacks,[12] federal courts were fairly successful in using the Fourteenth Amendment to protect the right to earn a living against interference by states in the latter quarter of the nineteenth century. For example, in *Yick Wo v. Hopkins*, the Court struck down a San Francisco ordinance that allowed city officials arbitrary and unlimited discretion to grant or withhold licenses to operate laundry businesses. "[T]he very idea that one man may be compelled to hold his life, or the means of living...at the mere will of another," declared the Court, "seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."[13] The phrase "means of living" alludes to *Merchant of Venice*, when Shylock tells the Duke "You take my house when you do take the prop / That doth sustain my house; you take my life / When you do take the means whereby I live."[14] The Supreme Court quoted this line in *Adams v. Tanner*,[15] when it struck down a Washington law that outlawed employment agencies.

The first Supreme Court case to consider the constitutionality of a state occupational licensing law was *Dent v. West Virginia*,[16] when it declared that states could require medical doctors to prove their qualifications before going into practice, because this was a reasonable way to prevent harm to the public. But, the Court declared, there are limits to what the state can demand of a person seeking to go into business. While the state may impose licensing requirements that are "appropriate to the calling or profession, and attainable by reasonable study or application," it may not impose requirements that "have no relation to such calling or profession, or are unattainable by such reasonable study and application," because then such requirements would "operate to deprive one of his right to pursue a lawful vocation."[17]

The Supreme Court has never overruled the *Dent* decision, and in fact has cited it repeatedly through the years.[18] In the 1957 case of *Schware v. Board of Examiners*, for example, the Court declared that New Mexico could not prohibit a person from practicing law on the grounds that he was a member of the Communist Party. Licensing restrictions, the Court held, must be "any qualification must have a rational connection with the applicant's fitness or capacity to practice [the profession]."[19] To use licensing laws to block people from entering a trade or profession simply to protect established firms against competition—without regard to protecting the public health and safety—is to abuse government power for the benefit of those who exercise raw political power. Such laws are fundamentally arbitrary, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[20]

Why courts have abandoned protections for economic freedom

Sadly, courts today often fail to take economic liberty seriously. The reason for this is the advent of what lawyers call "rational basis scrutiny" in the 1934 decision, *Nebbia v. New York*.[21] That decision abandoned the test by which judges had previously evaluated the constitutionality of economic regulations and replaced it with the new, extremely lenient "rational basis" test which declares that a law is constitutional if it is "rationally related to a legitimate government interest."

Unfortunately, this test is so poorly defined, that no lawyer really knows what it means—except that it virtually always results in the law being upheld, even if that law is unjust and unreasonable.[22] There are, however, enough cases in which plaintiffs have succeeded in having such laws invalidated, that nobody can be quite sure what the rational basis test actually allows. For example, the Supreme Court has sometimes said that actual *evidence* is not relevant in rational basis cases, because if a judge can imagine that a legislator might have believed that a challenged law would be good for the public, then that law is constitutional.[23] On the other hand, the Court has also insisted that laws are unconstitutional if there is no "relation between the [means] adopted and the object to be attained," and may not be "drawn for the purpose of disadvantaging the group burdened by the law."[24]

This confusion means that courts are today divided over the most basic of questions: when the government restricts a person's right to earn a living, must that restriction relate in some way to the public interest? Or may the government restrict economic freedom for no other reason than that it wants to?

The Fifth, Sixth, and Ninth Circuit Courts of Appeal have declared that while the Constitution allows states extremely broad discretion to regulate businesses, they may not regulate business for the sole purpose of protecting established businesses against legitimate competition.[25] The Tenth Circuit, on the other hand, has declared that states may use licensing laws to bar people from entering a business simply to protect established firms against competition, without regard to public health or safety considerations—that is, that the state may use licensing laws to block people from earning a living *simply because it chooses to do so*.

One thing that is for certain is that courts now allow states to restrict economic liberty—the right of a person to run a business, to work for a living, to earn what he or she wants, to choose his or her own work hours—practically at will. At one time, the right to earn a living was considered one of the crucial rights in the history of the Anglo-American common law tradition. But thanks to the rise of rational basis scrutiny, courts today typically turn a blind eye to the importance of this right, and allow legislative majorities to restrict economic opportunity for virtually any reason that they choose.

How licensing laws harm entrepreneurs and consumers

One out of three jobs in America requires a government license.[26] Many of these licensing requirements are backed by heavy monetary fines and even potential jail time. And the occupations covered by these requirements are many and various. The California

Professional And Business License Handbook, which lists every business for which a license is required, is some 300 pages long.[27]

Licensing restrictions are what economists call "barriers to entry." They impose costs on a person who would like to enter into a market. Those costs range from the relatively minor, as with an ordinary business license that simply requires the payment of a fee, to extremely substantial, as when the law requires a person to have a doctoral degree to practice medicine or a law degree to practice law. In New York City, government permission to operate a single taxicab costs over $1 million.[28] By raising the requirements, established firms can basically prohibit new firms from opening up and competing against them.

As I've noted, licensing laws have been used for this purpose for centuries. Existing firms, however, typically do not admit that they are increasing barriers to entry in order to prohibit competition; they generally claim that imposing burdensome educational or training requirements on new businesses protects the general public in some way. Sometimes, there is good reason to accept this argument, but it is also often an excuse. As Milton and Rose Friedman observed, while "the *justification*" for licensing laws is "is always the same: to protect the consumer...the *reason* is demonstrated by observing who lobbies...for the imposition or strengthening of licensure. The lobbyists are invariably representatives of the occupation in question rather than of the customers.... [I]t is hard to regard altruistic concern for their customers as the primary motive behind their determined efforts to get legal power to decide who may be a plumber."[29] Or, as Lord Coke put it in the seventeenth century, businesses seeking licensure are frequently like a man rowing a boat: "they look one way, and row another: they pretend public profit, intend private."[30]

Consider, for example, California's licensing law for pest control workers. To run a pest control business in California, one must have a license called a Branch 2 license. To obtain such a license, a person must first undergo two years of training, learning how to use, store, and handle pesticides, and then must pass a 200 question multiple choice examination on the use, storage, and handling of pesticides—even if the person does not use pesticides. My client, Alan Merrifield, had been in the structural pest control business for years, installing spikes on buildings to keep pigeons away, or installing nets or screens to keep rats from invading homes. But he was ordered to get a Branch 2 license, which would have required him to spend two years learning skills for which he would have no use. In fact, not only did the licensing exam test a person's knowledge of pesticides and insects—which had no relationship to his business—but it contained no questions at all testing one's knowledge of pigeons or spike installation. More remarkably still, the law applied only if a person installed spikes to keep *pigeons* away. The law did not apply if the person installed spikes to keep any other kind of bird away. Asked to explain this, the state's expert witness testified under oath that the reason for this exemption was that the law had initially required a license for any person practicing pest control, but that when it was proposed to limit that requirement to people who actually used dangerous chemicals, those practitioners who already had licenses objected, and asked the legislature to divide up the market for pest control work, allowing only existing license holders to deal with pigeons, rats, and mice, since they are the most common household pests.[31] Fortunately, the Ninth Circuit Court of Appeals declared that it was unconstitutional for the law to "irrational[ly] singl[e] out of three types of vertebrate pests from all other vertebrate

animals...[just] to favor economically certain constituents at the expense of others...such as Merrifield."[32]

Merrifield was successful in his lawsuit, but many entrepreneurs do not have the wherewithal to bring a case challenging the constitutionality of a licensing law, and other courts have held that states may impose extremely burdensome education and testing requirements on entrepreneurs. Consider the case of Sandy Meadows, a Louisiana woman who was forced to give up her job as a florist because she did not have a license to practice floristry. Remarkable as it is, the Pelican state requires that a person obtain a special license to be a florist, and to get a license required significant training and both an hour-long written exam and a three-hour practical examination. On the practical exam, applicants were graded on such subjective criteria as the "harmony" and "effectiveness" of their flower arrangements.[33] When this ridiculous licensing requirement was challenged in court, the court upheld it, on the grounds that the licensing requirements protected public safety, because unlicensed florists might not know how to properly use the wire that florists use to hold their flower arrangements together, and customers could scratch their fingers.[34] Ms. Meadows, thrown out of her job, died in poverty shortly thereafter.[35]

Occupational licensing laws harm entrepreneurs because by imposing high start-up costs, they hit entrepreneurs where it hurts the most. Entrepreneurs—particularly in such entry-level jobs as floristry—normally lack the start-up capital or the education that is required to obtain a license. And these can be very substantial. Florida law, for example, requires that interior designers hold a college degree.[36] Even where the educational requirements are not so severe, testing can be an expensive undertaking. Aside from the fees required to take an exam, some exams are offered only once or twice a year, sometimes in only a few cities, so that applicants must pay for transportation and lodging to take the exam. For example, the Louisiana florist exam costs $150, and is administered quarterly in Baton Rouge, meaning that applicants from other cities must pay travel and lodging expenses. These and other expensive barriers to entry ensure that the poor and members of minority groups are disproportionately excluded from the opportunity to earn a living in ordinary trades like interior decorating or floristry. Because only 47 percent of black and Hispanic interior designers nationwide have a college degree, while 66 percent of the country's white interior designers do, licensing requirements block members of these minority groups from the trade.[37] People who might have learned on the job are deprived of that opportunity. The result is often to push members of these groups into the illegal, underground economy—where they consequently run a greater risk of being fined, or even charged with a crime, for illegally operating without a license. And because many states bar people from obtaining licenses if they have ever operated without a license, the result is to block them permanently from earning an honest living in the trade of their choice. In other cases, such as in New York, where permission to operate a taxicab is priced far beyond the range of most entrepreneurs, the result is to perpetuate socioeconomic class status and retard upward mobility.[38]

Of course, licensing requirements also harm consumers by raising costs and deterring innovation. Research by Morris Kleiner, one of the nation's leading authorities on occupational licensing, shows that, depending on the location and the service at issue, licensing raises prices by 4 to 35 percent.[39] For example, studies of licensing in the optometry profession by the

Federal Trade Commission and others find that it increases prices by about 20 to 25 percent.[40] Licensed occupations charge between 4 and 12 percent more for services than unlicensed occupations do.[41] Of course, such measurements are very hard to perform, because many factors that affect prices and because licensing laws affect services rather than goods. But studies have shown quite clearly that licensing reduces the number of practitioners in any given field.[42]

Licensing laws also retard innovation by defining the regulated trade so broadly that new firms are blocked from the chance to provide unusual or new services. For example, in a number of recent lawsuits, hair-braiders have challenged the licensing laws for hairdressers, on the grounds that it is irrational to require people who only braid hair to also take expensive and time consuming classes learning how to do other kinds of hairstyling that they don't do.[43] In the North Carolina Dental Board case now pending before the Supreme Court, the state agency charged with regulating dentistry tried to define teeth whitening—which a person can do in his own home with an over-the-counter kit—as the practice of dentistry. In Lauren Boice's case, the state of Arizona tried to force her to get a cosmetology license even though all she did was arrange appointments for licensed cosmetologists. In all these cases, new innovations allow entrepreneurs to provide a single service that the government has lumped in with other services in the "scope of practice" with a licensed trade. By requiring a person to become a full-fledged barber before she can braid hair, or to become a dentist before he can apply a teeth-whitening strip, the government deters innovation and creativity.

The harm caused by licensing laws is, of course, disproportionately felt by the poor and members of minority groups who are hit hardest in the pocketbooks. Economists refer to this as "the Cadillac effect." Licensing requirements essentially require consumers to buy a Cadillac if they want a car. And since many people cannot afford a Cadillac, they either go without, or resort to unlicensed, unsafe alternatives—whereas, if they could have bought a Ford or a Toyota instead, they would have had adequate service at a price they could afford.

The "Competitor's Veto"

Even where licensing laws do not impose educational or training requirements, they are often used to exclude people from ordinary trades solely for the purpose of protecting established businesses against legitimate competition. A prime example of this is in the household goods moving industry. Some 22 states[44] require household goods movers to obtain a "Certificate of Public Convenience and Necessity" before they may operate a moving business.

A Certificate of Public Convenience and Necessity typically requires an applicant for a license to first notify all of the existing companies in the industry of their intent to apply for a license. The existing firms are then allowed to file objections or protests against the applicant, whereupon the applicant is required to prove to a government agency that there is a "public need" for a new company in that industry. The standards for proving a "public need" are usually extremely vague, or even missing entirely from the statute. In short, these laws give existing firms the power to block their own competition—what I call the Competitor's Veto.

Certificate of Public Convenience and Necessity laws—also known as Certificate of Need or CON laws—were invented in the late nineteenth century to regulate railroads, streetcars, omnibuses, and so forth at a time when these industries were often funded by private investors operating under a franchise. The idea was that, because the government often imposed expensive regulatory burdens on these companies—requiring them, for example, to provide unprofitable service to out-of-the-way customers, or to limit what they charged to below market rates—the private investors faced a serious risk that other, more competitive businesses would take away their business. Government therefore created the CON restriction as a monopoly privilege, similar to a patent, to encourage private investment.[45]

But the industry changed radically with the invention of the automobile, and the laws never changed with them. Thus today, the moving industry is nothing like a public utility—it is a normally competitive market with relatively few start up costs, and it does not compete against any government-run industry. Yet the CON laws remained in place. The result is to block economic opportunity in an industry that would otherwise provide an excellent chance for entrepreneurship.

Consider the CON laws for movers in Kentucky and Missouri. Included in Appendix C to this testimony is my forthcoming article in the *George Mason University Civil Rights Journal* which explains how Missouri's recently repealed CON law for movers was exploited by existing moving firms to block competition from newcomers. In brief, between 2005 and 2010, 76 applicants sought CONs to operate moving companies in Missouri. Seventeen sought authority to operate statewide, and all were subjected to one or more objections by existing firms, for a total of 106 interventions. All of the objections were filed by existing moving companies that already had CONs, and all stated as the *sole* basis for intervention that allowing a new moving company would cause "diversion of traffic or revenue" from them. No objection was ever filed by a consumer, and none ever alleged any danger to public health, safety, or welfare, in the event that the application was granted. Nor did any provide the government with information relating to public health or safety. The other 59 applicants for moving licenses sought authority to operate either within a "commercial zone"—such as the cities of St. Louis or Kansas City—which were exempt from the objection rules, or requested permission to operate in a rural area where they would not compete against existing firms.

The mere filing of an objection meant that the applicant would face substantial extra costs. Whenever an objection was filed, the applicant was required to participate in a hearing to prove that a new moving company would serve the "public convenience and necessity" (a vague term not defined in the law). The law required that any applicant organized as a corporation was required to hire a lawyer—an owner was not allowed to represent the corporation—and the average wait time for a Certificate if an objection was filed was 154 days, with one applicant forced to wait 1,119 days—more than three years—before obtaining a CON.[46] As a result, in virtually every case, when an objection was filed, the applicant would withdraw the application and ask instead for permission to operate in a Commercial Zone or in a small area that would not compete against existing firms. Whenever this happened, existing firms would withdraw their objections. In only three cases did applicants refuse to do this—one later abandoned his application and sought instead permission to buy a CON from an existing mover, whereupon the existing firms withdrew their objections. In another, the

applicant was denied a CON in a written decision that held that although he was fully qualified, he would compete against existing firms, and was denied for that reason. In the third, the applicant was granted in a CON in a written decision that found that it was fully qualified, and that competition was a good thing.

Fortunately, Missouri repealed its CON law in 2012, in response to our lawsuit challenging its constitutionality. But Kentucky refused to do so, and in another lawsuit that we brought, the Federal District Court for the Eastern District of Kentucky just last month found that the Bluegrass State's CON law was unconstitutionally arbitrary and discriminatory.

Kentucky law provides a three-step process for obtaining a CON to operate a moving company. When a person applies for a CON, the state's Motor Carriers Division would first review the application to ensure that the applicant is "fit, willing and able to properly perform the service proposed"—that is, that the proposed business complies with public health, safety, and welfare considerations. Second, the applicant was required to prove that "existing transportation service is inadequate," and that a new moving company would serve the "present or future public convenience and necessity." No statute, regulation, case law, or other legal source defined these terms, nor is there any handbook or other standard guideline to which the Division could refer when applying these standards. Third, existing moving firms were invited to object to the issuing of any new CON, whereupon the applicant was required to attend a hearing and prove the "inadequacy" and "present or future public convenience and necessity" requirements.

Again, existing firms skilfully exploited these laws as a Competitor's Veto, to protect themselves against any new competition. Between 2007 and 2012, there were 39 applications for CONs. Of these, 19 were protested by one or more existing moving companies, for a total of 114 protests—all of which were filed by existing moving firms. None ever alleged, proved, or stated any concerns about the public health, safety, or welfare consequences if the application in question were granted; all protested on the grounds that a new moving firm would "directly compet[e] with . . . the[] protestant[] and . . . result in a diminution of protestant['s] revenues." No protest ever provided the Division with facts relating to an applicant's public safety record, experience, honesty, skills, or any other matter relating to public health, safety, or welfare, and the Division never rejected a CON application on the basis of public health or safety considerations; all rejections have been on the basis that existing services were not "inadequate." Unsurprisingly, of the 19 Protested applications since 2007, 15 chose to abandon or withdraw their applications rather than go through a hearing.

No applicant was ever granted a CON when an objection was filed. The Division has rejected every contested application on the grounds that existing services were not "inadequate." The Division never rejected an applicant on public health or safety grounds. Instead, existing firms always objected on the grounds that a new firm would compete economically against them. Thus the state would refuse licenses even to fully qualified applicants simply to protect established firms. For example, one applicant had been in the moving business for 35 years, working for his father's company, when he decided to apply for a CON in his own name. He suffered six protests by existing firms, none of which identified any public safety or welfare concerns; all complained that his company would be "directly competitive with" the their operations and "result in a diminution of [their] revenues." The

applicant participated in a hearing, at which no testimony or other evidence was introduced suggesting that he was unqualified—in fact, On the contrary, one moving company testified that he "believe[d] that [the] applicant...would be a great mover." Yet the Division rejected his application on the grounds that he had "not prove[n] that the existing household goods moving service in Louisville is inadequate and that his proposed service is needed." The only basis for this conclusion was that existing firms had objected. The applicant was denied a Certificate solely because he would compete against them. This was only one example of a repeated pattern.

Notably, when a new company sought permission to *buy a CON from an existing firm*, the rules were different. Although the same laws apply to these "transfer applications" as apply to applications for new CONs, transfer applications do not pose the same competitive threat to existing moving companies. As a result, no transfer application was ever protested, and none was ever denied. In at least three cases, applicants who initially applied for new CONS and suffered objections, and either had their applications denied or chose to withdraw their applications, later bought a CON from a company that had protested against its original application! For example, when Little Guys Movers applied for a new CON in March, 2012, eight existing companies protested, including Affordable Moving, Inc. Little Guys abandoned its application, but five months later, applied for permission to buy a CON. That request was approved a month later without protest, and the company that sold the CON to Little Guys was Affordable Moving, Inc.

Even applicants who were denied new CONs on the basis of illegal activity were allowed to buy existing CONs later and open up business. For example when Margaret's Movers applied for a new CON, its application was protested by eight firms, and in September, 2008, the Division denied the application in part because Margaret's had operated without a CON in the past, thus proving that it was not "fit, willing, and able," and also that existing moving services were "adequate." One of the firms protesting against Margaret's was J.D. Taylor. Only 17 months later, in November, 2009, Margaret's filed a new application, this time to buy an existing CON. This time, Margaret's application was not protested, and the Division—which had earlier found that Margaret's was not "fit, willing, and able"—now concluded that Margaret's was "fit, willing, and able," and astonishingly cited as grounds for that conclusion the fact that Margaret's "[had] been in the moving industry for over ten (10) years"! The company that sold Margaret's the Certificate was J.D. Taylor.

The justifications for CON laws are threefold. First, some argue that in certain markets, competition can be bad for the consumer. Although economists now almost universally agree that competition is good for consumers, some contend that in markets with high start-up costs and homogeneous goods or services, there can be "too many" firms, which can lead to higher prices. This is a purely theoretical model that has never been verified by any empirical research. But even if it were true, this model is not applicable to the moving industry or other normal, competitive industries. The moving industry has low start up costs—insurance, a truck, some labor—and heterogeneous services. There are movers who provide a wide variety of services, moving everything from bookcases to delicate scientific equipment, and providing different sorts of customer service.

Second, some argue that CON laws ensure that the government gets information about a market from the firms who are in that market, and know the industry better than bureaucrats would. This is the rationale, for instance, for staffing licensing agencies with existing practitioners in the field—an issue the Supreme Court will be taking up in its next term.[47] But this argument ignores the obvious conflict of interest involved when existing firms are able to impose significant administrative and transaction costs on their potential rivals. As the Missouri and Kentucky cases demonstrate, existing firms rarely contribute information to regulators that is unavailable elsewhere, or at least they do so far less often than they exploit their power to establish and maintain a cartel.

Finally, some argue that CON laws remedy "information asymmetry"—that is, that because customers lack the information necessary to make an informed choice about the goods or services they buy, the regulation ensures more transparency and protects consumers. While information asymmetry may be a valid reason for certain types of regulation, however, it has little connection to CON laws, which do not involve consumers in any meaningful way. Indeed, there are far more effective means of ensuring that customers get the information that they need, or to prevent fraud or improper practices. Customers can research a moving company on Angie's List or Yelp, or get information from the Better Business Bureau or other sources, before hiring a mover. And laws against fraud, or requiring regular inspections or reports, are far more effective at ensuring transparency.

In February, the Federal District Court for the Eastern District of Kentucky, concluded that that state's CON law for moving companies was unconstitutional. The law "provid[es] an umbrella of protection for preferred private businesses while blocking others from competing, even if they satisfy all other regulatory requirements," the court declared. "Existing moving companies that protest new applicants are not required to offer (and none has ever offered) information about an applicant's safety record," and "there is no indication that personal property is protected at all by allowing existing moving companies to keep potential competition from entering the market." Under Kentucky's CON law, "an existing moving company can essentially 'veto' competitors from entering the moving business for any reason at all, completely unrelated to safety or societal costs." The CON law was "an act of simple economic protectionism," which "offend[s] and violate[s] the Fourteenth Amendment."[48] Again, while this was a gratifying outcome, challenging such laws in court is expensive and time-consuming—and an uphill battle, as other courts have thrown out even strong challenges to CON laws.[49]

Recommendations for reform

Licensing laws are usually imposed by state or local governments, and the federal government lacks authority to impose its own regulations in many of these trades. But there are several ways in which Congress could act to protect entrepreneurs against unjust, arbitrary, and irrational violations of their right to earn a living.

• First, *new Civil Rights legislation is badly needed to protect the rights of entrepreneurs and business owners.* The first Civil Rights law, in 1866, was largely devoted to protecting the rights

of all Americans to make contracts and protect their private property rights. Sadly, these issues have gone ignored in recent decades, and courts have turned a cold shoulder to these matters. Section Five of the Fourteenth Amendment allows Congress to protect the civil rights of all Americans against interference by states, and, again, *no civil right is more frequently violated in this country than the right to earn a living*. New legislation that forbids states and local governments from using licensing laws in order to protect established firms from safe and qualified competitors, would not only be within Congress's power, but a welcome relief from the abuse of licensing laws. Or legislation modeled on RLUIPA, that requires certain types of regulations to satisfy a higher test than the largely meaningless "rational basis" requirement, would also help protect business owners.

• Second, the federal government can *use the spending power to require states and local governments to provide greater protections of economic liberty in exchange for receiving federal grants*. Congress already uses this power to apply greater protections for members of minority groups or to accomplish other goals; there is no reason the federal government could not require that local officials respect economic liberty if they are going to receive federal subsidies.

• Third, Congress should *revoke antitrust immunity for regulatory bodies that abuse government power for private ends*. This would help to prevent the anticompetitive nature of many licensing laws. There are many valid objections to antitrust laws, and the nation would be better off without them entirely.[50] But so long as they exist, there is no rational justification for the current immunity that state agencies and even private entities acting under color of state law enjoy. As Professors Edlin and Haw explain in the article attached as Appendix B, government entities—especially licensing and regulatory agencies comprised of existing business owners who have a vested interest in excluding competition—often abuse licensing laws in ways that hurt consumers and burden entrepreneurs. This is *per se* anticompetitive conduct—in fact, it is *exactly* the same conduct that the earliest anti-monopoly law, the Statute of Monopolies, was directed against. Yet under today's law, these entities are declared immune from the antitrust laws precisely when they engage in the most anticompetitive activity possible! As Chief Justice Warren Burger observed, the antitrust laws were "'meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade,'" so it is "absolutely arbitrary" to declare "that any similar harms [government] might unleash upon competitors or the economy are absolutely beyond the purview of federal law."[51] The Supreme Court will soon be taking up this matter, but there is no reason Congress could not act now to ensure that when the government creates a cartel, it is at least subject to the Federal Trade Commission's oversight.

• Also, Congress should *establish an office in the Civil Rights Division of the Justice Department charged exclusively with protecting economic liberty against unjust government interference*. Many intrusions on economic liberty already violate *existing* civil rights protections, but because citizens lack access to legal representation—and particularly because of the difficulty of winning such cases under existing precedent—they are unable to defend their rights in court. Although the Civil Rights Division effectively enforces civil rights protections in a wide variety

of areas, it does not focus much on protecting the rights of entrepreneurs against laws that systematically exclude the underprivileged.

• Most important of all: *raise awareness.* Sadly, although Americans generally recognize the importance of the right to earn a living, and are shocked when they learn of the ways that this right is routinely trampled upon, there is at present little focus on this aspect of our civil rights. Even many local government officials are under-informed about the consequences of their own anti-competitive policies. Exposing these injustices and raising awareness of their impact and frequency is absolutely crucial to reform.

Thank you.

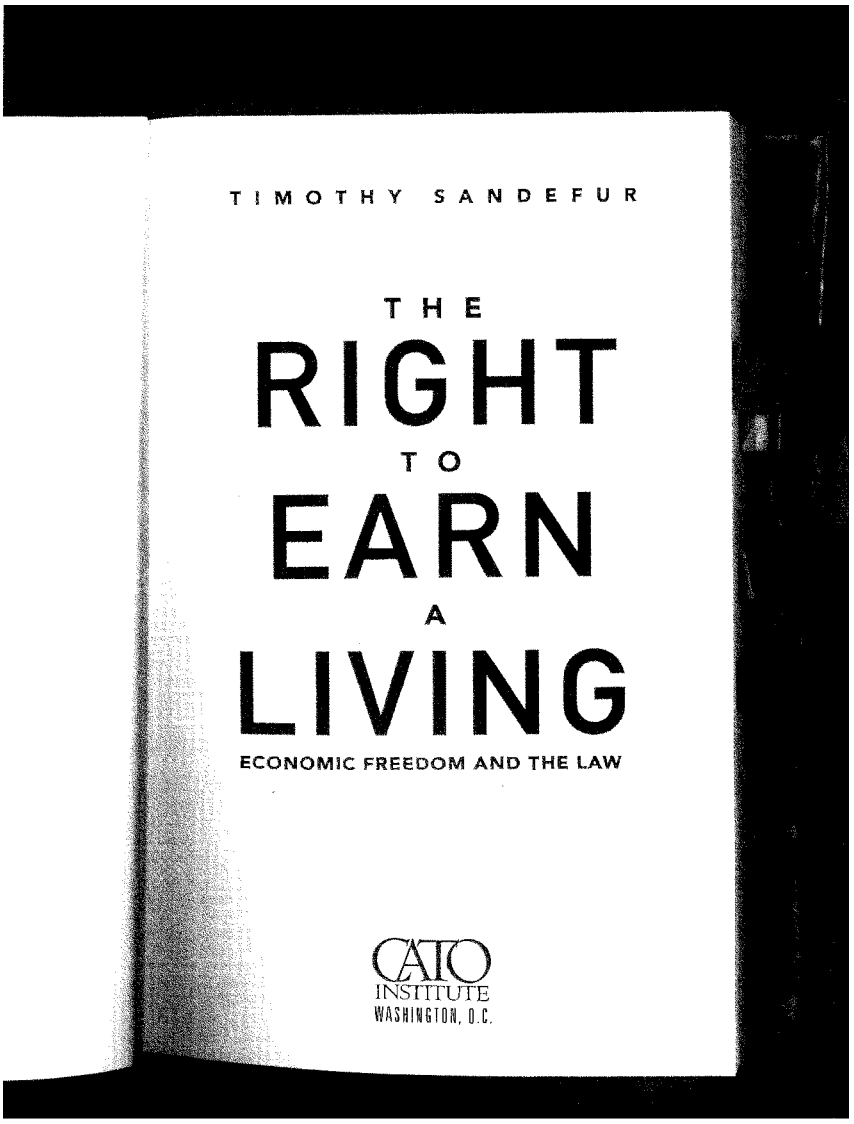
Timothy Sandefur
Principal Attorney

Notes

[1] *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).
[2] *See* Timothy Sandefur, *The Right to Earn A Living* 18-25 (2010).
[3] *Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614).
[4] *The Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218, 1219 (1615).
[5] 2 Edward Coke, *Institutes* *47.
[6] Merrill Peterson, ed., *Jefferson: Writings* 108-09 (1984).
[7] *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823).
[8] *Congressional Globe*, 42d Cong., 1st Sess. App. p. 86 (1871).
[9] *Congressional Record*, vol. 1 p. 363 (1874).
[10] *Congressional Globe*, 42d Cong., 2d Sess. p. 844 (1872).
[11] *In re Parrott*, 1 F. 481, 506 (C.C.D. Cal. 1880).
[12] Most notably, the Supreme Court's practical nullification of the privileges or immunities clause of the Fourteenth Amendment in *The Slaughter-House Cases*, 83 (16 Wall.) 36 (1873).
[13] 118 U.S. 356, 370 (1886).
[14] Act IV sc. I ll. 371-74.
[15] 244 U.S. 590, 593 (1917).
[16] 129 U.S. 114 (1889).
[17] *Id.* at 122.
[18] *See, e.g., Conn v. Gabbert*, 526 U.S. 286, 292 (1999);
[19] 353 U.S. 232, 239 (1957).
[20] *See generally* Timothy Sandefur, *The Conscience of The Constitution* 71-120 (2014).
[21] 291 U.S. 502 (1934).
[22] For one thing, the Court has never explained what "legitimate state interest" means. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest.'").
[23] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-16 (1993).
[24] *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).
[25] *Craigmiles v. Giles*,312 F.3d 220 (6th Cir. 2004); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n. 15 (9th Cir.2008); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013).
[26] Morris M. Kleiner and A.B. Krueger, *The Prevalence And Effects of Occupational Licensing*, 48 British J. Indust. Relations 676 (2010). *See also* Dick Carpenter, *et al., License to Work: A National Study of Burdens from Occupational Licensing* (2012), avail. at http://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf.
[27] Avail. at http://www.ci.rialto.ca.us/redevelopment_749.php.
[28] Matt Flegenheimer, *$1 Million Medallions Stifling The Dreams of Cabdrivers*, N.Y. Times, Nov. 14, 2013, avail. at http://www.nytimes.com/2013/11/15/nyregion/1-million-medallions-stifling-the-dreams-of-cabdrivers.html?_r=0.
[29] *Free to Choose* 240 (rev. ed. 1980).
[30] Quoted in R.H. Coase, *The Firm, The Market, And The Law* 196 (1988) (spelling modernized).
[31] *See* Sandefur, *Right to Earn A Living* at 157-58.
[32] *Merrifield*, 547 F.3d at 991.
[33] *See* Sandefur, *Right to Earn A Living* at 133-34.
[34] *Meadows v. Odom*, 360 F. Supp. 2d 811, 824 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006).
[35] *See* Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 Notre Dame J.L. Ethics & Pub. Pol'y 381, 402-03 (2012).
[36] *See* Dick Carpenter, *Designing Cartels: How Industry Insiders Cut Out Competition* 7 (Institute for Justice, Nov. 2007), available at http://www.ij.org/images/pdf_folder/economic_liberty/Interior-Design-Study.pdf.
[37] *See* David E. Harrington & Jaret Treber, *Designed to Exclude: How Interior Design Insiders Use Government Power To Exclude Minorities & Burden Consumers* 9 (Feb. 2009), avail. at http://www.ij.org/images/pdf_folder/economic_liberty/designed-to-exclude.pdf.

[38] *See* Sandefur, *Insiders, Outsiders*, at 407-08.
[39] Kleiner, *Licensing Occupations* at 59.
[40] *Id.* at 60-61.
[41] *Id.* at 112.
[42] *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* (U.C. Berkeley Public Law Research Paper No. 2384948) , at 17, avail at http://ssrn.com/abstract=2384948.
[43] *See, e.g., Cornwell v. Hamilton*, 80 F.Supp.2d 1101 (S.D. Ca. 1999).
[44] Alabama, Arkansas, Colorado, Connecticut, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, Nevada, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Carolina, Virginia, Washington, and West Virginia.
[45] *See* William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426 (1979).
[46] Missouri Department of Transportation Motor Carrier Services Division, *2011 Division Tracker* at 6c(1), avail. avail. at http://www.modot.org/mcs/documents/January2012D-tracker.pdf .
[47] *North Carolina Board of Dental Examiners v. FTC*, No. 13-534.
[48] *Bruner v. Zawacki*, CIV.A. 3:12-57-DCR, 2014 WL 375601 (E.D. Ky. Feb. 3, 2014), included as Appendix D.
[49] For example, district courts have dismissed challenges to CON laws in several cases. *See, e.g., Underwood v. Mackay*, 2013 WL 3270564 (D. Nev. June 26, 2013); *Jones v. Temmer*, 829 F. Supp. 1226 (D. Colo. 1993), *vacated as moot on appeal*, 57 F.3d 921 (10th Cir. 1995); *Colon Health Centers of Am., LLC v. Hazel*, 1:12CV615, 2012 WL 4105063 (E.D. Va. Sept. 14, 2012), *aff'd in part, rev'd in part*, 733 F.3d 535 (4th Cir. 2013).
[50] *See generally* Dominick T. Armentano, *Antitrust And Monopoly: Anatomy of A Policy Failure* (2007); Edwin S. Rockefeller, *The Antitrust Religion* (2007).
[51] *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 419-20 (1978) (opinion of Burger, C.J.).

Appendix A


TIMOTHY SANDEFUR
THE
RIGHT
TO
EARN
A
LIVING
ECONOMIC FREEDOM AND THE LAW
CATO
INSTITUTE
WASHINGTON, D.C.

government turned Jones down. Jones filed a lawsuit, pointing out that the city had refused every such application since 1947 and arguing that its refusal to grant new permits arbitrarily created a monopoly at the expense of consumers and honest entrepreneurs. Nevertheless, the trial judge threw Jones's case out of court.[8]

Even where licensing boards are not staffed by owners of competing businesses with an obvious conflict of interest or by bureaucrats with friends or family members in the business, laws like these present problems for entrepreneurs trying to earn a living. The general public is usually unaware of the Byzantine rules companies are required to follow, while the companies seeking protection are very familiar with them. Thus, although regulatory agencies often open their hearings to the public, members of the public rarely attend and are usually not organized. The agencies hear forceful arguments from representatives of existing companies but rarely from consumers, and they are consequently biased. Even ignoring such biases, "certificate of necessity" schemes impose a nearly impossible burden on newcomers. Proving that a new business is "necessary" is virtually impossible, even with extensive polling data and research. Existing companies can always argue that a newcomer is not "necessary" because the existing businesses could handle any increased consumer demand by increasing their prices, adding another office, or getting a government subsidy. What's more, many businesses that consumers enjoy patronizing are not strictly "necessary" but only *convenient*. Are cell phones really *necessary*? What about decorative covers for cell phones, or amusing ringtones? The term "necessary" is itself hard to define, and the notion that a government bureaucracy can decide what businesses are or are not necessary for consumers is a fantasy, and a dangerous one because it plays directly to the self-interest of established businesses that seek protection against competition.[9] The only group capable of deciding whether a business is really necessary for a community, and the only group that can be trusted with the power to make such a decision on behalf of consumers, is consumers themselves.

Although there are any number of ways for interested businesses to use the law to exclude competition, four methods are of particular interest: occupational licensing laws, zoning regulations, "agricultural adjustment," and franchise acts.

Licensing

The justification for modern occupational licensing, as it was developed in the 19th century, was that such laws would protect the public from dangerous or incompetent practitioners. By requiring doctors to prove that they knew how to perform operations safely and effectively, for example, the government could ensure that consumers did not fall victim to quacks and con artists. In 1889, in *Dent v. West Virginia*,[10] the first Supreme Court decision to address occupational licensing, Justice Field held that such laws were a legitimate way to protect "the general welfare of [the] people" and "secure them against the consequences of ignorance and incapacity, as well as of deception and fraud."[11] But if the licensing requirements had "no relation to such calling or profession," or if licenses were "unattainable by . . . reasonable study and application," such laws would "operate to deprive one of his right to pursue a lawful vocation" and thus violate the Constitution.[12] More than half a century later, the Court reaffirmed this conclusion when it held that the state may not bar a person from a profession on the basis of irrelevant factors, such as his political opinions.[13] Unfortunately, despite claims that it would protect the general public, licensing is often used as a tool to prevent competition from disfavored groups.

Abuses started early.[14] In 1878, California called its second constitutional convention at the behest of a powerful political organization called the Workingmen's Party. The party advocated new restrictions on corporations, particularly railroads, as well as an end to what it called the "Chinese Menace": the enormous influx of immigrant labor from China, which increased the supply of available labor and thereby drove down the costs not only of labor but of the goods and services that labor produced. Although the lower prices were good news for consumers, the decrease in the price of labor—that is, wages—made it harder for natives and European immigrants to demand high pay for their work. Whites were explicit about their outrage over this state of affairs. As one delegate to the convention put it, a Chinese worker was "a creature, whose muscles are as iron, whose sinews are like thongs, whose nerves are like steel wires, with a stomach case lined with brass; a creature who can toil sixteen hours of the twenty-four. . . . The white man cannot compete in the field of labor with such a being as that. . . . If the white man is to compete with the Chinaman he must adopt a cheaper style of

dress, must inure himself to the cold, he must labor in the night; sleep shall not come to his pillow until the midnight bell . . . [and he must] arise at the first gray streaks of dawn."[15] In other words, while racists sometimes accuse racial minorities of being lazy, those who attacked the Chinese accused them of being intelligent and hard working. As one railroad laborer later recalled, the Chinese were hated "not for their vices but for their virtues . . . because [they] are so much more honest, industrious, steady, sober, and painstaking."[16]

Hostility to Chinese competition manifested itself in many ways in California: Whites imposed harsh restrictions on the economic freedom of Chinese workers, including special taxes and laws that barred them from carrying laundry on poles or from delivering laundry except on horseback or from fishing in local waters.[17] Often, these restrictions were cleverly designed to impose burdens that white lawmakers knew would be especially difficult for the Chinese, even though the laws did not explicitly identify the Chinese as targets.

The delegates at the constitutional convention proposed many ideas for excluding the Chinese from California, including prohibiting them from owning any property in the state and prohibiting any California corporation from employing a Chinese person. One delegate spoke for many when he explained that he was "willing to go as far as any gentleman on this floor by way of police, sanitary, criminal, or vagrant regulations, or refusing to license this class of aliens to carry on any trade or business whatever, if we can in any way, by statute or otherwise, prevent the same." His goal was "to hamper them in every way that human ingenuity could invent."[18] As this hateful proposal suggests, occupational licensing laws have often been used as a tool for excluding racial minorities from trade, thereby keeping up the income of politically powerful racial groups.

California's abuse of the Chinese led in 1886 to one of the most important early Supreme Court cases regarding economic liberty: *Yick Wo v. Hopkins*.[19] San Francisco had enacted a municipal law requiring laundry businesses to be housed in buildings made of brick. Any laundry in a building made of wood had to be licensed by a city official, who was given complete discretion to grant or to deny such permits. The city claimed the law was intended as a fire-safety measure, but the Supreme Court disagreed. It was plainly meant to persecute the Chinese, who ran most of the city's laundry businesses.

By allowing city officials carte blanche to grant or deny permits, the law made business owners into "tenants at will . . . of their means of living"[20]—meaning that they could in a sense be "evicted" from their jobs at any time. The law put no limits on what officials could do when granting or withholding permits; it gave them unbridled discretion. That was intolerable because "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another" was "the essence of slavery itself."[21] The justices did not buy the argument that the law was intended to prevent the spread of fire; even a law appearing equal on its face could "amount to a practical denial by the state of [the] equal protection of the laws" if the government enforced it "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights."[22] The right to earn a living was one of the rights "secured by those maxims of constitutional law which are the monuments showing the victorious progress of the [human] race in securing to men the blessings of civilization under the reign of just and equal laws."[23]

Yick Wo was, and remains, a milestone in the protection of racial minorities. But while the Chinese business owners were successful in that case, similar abuses continued,[24] not only against the Chinese but against many other minorities. Professor David E. Bernstein has documented the ways that licensing laws were used to bar blacks from earning a living legally during the Jim Crow era.[25] On rare occasions, courageous judges would hold these licensing laws to be unconstitutional. For example, in 1924, the Arkansas Supreme Court invalidated a licensing law for plumbers on the ground that it did not actually protect the public from dangerous or shoddy practices but was instead "passed from other motives."[26] The licensing examination tested obscure knowledge and unusually difficult tasks, which gave the bureaucrats in charge of the licensing scheme "arbitrary and oppressive power" to "deprive one who is thoroughly qualified to do the practical work of plumbing of his constitutional right to pursue his avocation, and perhaps his only livelihood, because, forsooth, he was unable to answer some technical or theoretical question, not in any sense germane to the real and practical trade of a plumber, and not having even the remotest connection with the actual conservation of the public health."[27] But in

general, successful challenges to occupational licensing laws were rare. As Bernstein observes, "The results of judicial acquiescence in the licensing system," along with other factors such as union violence against black workers, "were disastrous for African Americans who sought work as plumbers" or as practitioners of other licensed trades.[28] In fact, racial exclusion played such an important role in economic regulation in the late 19th and early 20th centuries that civil rights leader Frederick Douglass railed against labor unions and similar groups for scheming to bar blacks from earning a living for themselves and their families. And in 1951, Thurgood Marshall, a lawyer for the National Association for the Advancement of Colored People and a future Supreme Court justice, complained that the rational basis test was so deferential toward government that courts were failing to protect the rights of blacks, including the right to earn a living.[29]

Of course, even in the absence of explicit racist intent, many occupational licensing schemes have significant racial biases. JoAnne Cornwell discovered this in the 1990s when she opened her San Diego business called Sisterlocks, devoted to performing a unique hair-braiding method called "locking," similar to traditional African methods of hair care. Like African hair braiding, Cornwell's locking method did not involve chemically treating or cutting the hair. But when California regulators heard about her business, they demanded that Cornwell and all natural hair care stylists get a license from the Board of Barbering and Cosmetology. Obtaining a cosmetology license required applicants to spend 1,600 hours at a state-approved cosmetology school, at a cost of more than $5,000, before even taking the test. And the hairstyling techniques taught in the school had no relation to Cornwell's business since, as a federal court later pointed out, "African hair styling is uniquely performed on hair that is physically different—alternatively described as tightly textured or coily hair—and that this physical difference is genetically determined to be in close correlation with race."[30] The curriculum Cornwell would be required to take, moreover, involved learning hairstyles that had not been popular for decades and that could only be performed on the hair of white customers. Worse, they required the use of chemicals that Cornwell and her fellow hairstylists did not believe in using.

Cornwell and others filed suit in federal district court, arguing that her business was not "barbering" or "cosmetology" and that it was irrational for the state to force her to obtain a barbering or cosmetology license. They claimed that the requirements violated the equal protection and due process clauses of the Constitution by restricting their liberty without any sensible connection to public health and safety. The court ruled in their favor. Forcing Cornwell to "spend nine months attending a cosmetology school, at a cost of $5,000–$7,000, learning skills, 96% of which [she] will never use" violated the rational basis requirement.[31]

Cornwell's victory was unusual. As we have seen, under the "rational basis test," entrepreneurs who challenge the constitutionality of absurd and abusive occupational licensing laws rarely succeed.[32] The Louisiana florist case discussed in the last chapter typifies everything wrong with occupational licensing laws: they represent a thin pretext of public benefit stretched over blatant anticompetitive practices. In 2004, after the Louisiana House of Representatives voted overwhelmingly in favor of a bill to eliminate the florist licensing requirement, the bill nevertheless died in the Senate's Agriculture Committee after intense lobbying by licensed florists. Even the state commissioner of agriculture lobbied against the bill, after interviewing several licensees—but not speaking to any unlicensed, would-be florists—because (as he later testified) "I have committed to the florists when I ran [for office] in 1980 that I would support their desires of either having or get[ting] rid of the law."[33] The Louisiana florist law exemplifies what the "public choice" school of economics calls "legislative capture": the exploitation of government's coercive powers for the benefit of private-interest groups. In this, it is only one of the many examples of the legalized protection racket known as occupational licensing.

Even when licensing is advanced by responsible public-minded groups, the government agencies in charge of licensing are routinely captured by businesses that stand to gain from controlling competition. This is why Milton Friedman contended that licensing "almost inevitably becomes a tool in the hands of a special producer group to maintain a monopoly position at the expense of the rest of the public. There is no way to avoid this result."[34] Economists and lawyers have assembled a mountain of evidence supporting Friedman's

conclusions: licensing raises costs to consumers, with little observable improvement in the quality of many licensed services.[35] Moreover, such laws appear to benefit highly paid practitioners more than those who are paid less, because "more highly educated and influential occupations may be more powerful in state or local jurisdictions and may be able to control supply more effectively."[36]

Some abuses of occupational licensing are remarkably brazen. In 2007, psychics in Salem, Massachusetts, urged the city to create a licensing requirement, allegedly to protect consumers from incompetent psychics, despite the fact that it is literally impossible to be a *competent* psychic.[37] But they sought a licensing scheme both to provide them with sham legitimacy and to shut out competition in what is otherwise an entry-level business with low start-up costs.

Strangely enough, two of the three most important economic freedom cases decided after the New Deal involved occupational licensing for people selling coffins.[38] These cases raised the question of whether the Constitution allows the government to create licensing laws solely for the *explicit* purpose of granting benefits to one business or group of businesses over another or whether licensing laws must be related in even the most abstract way to protecting the public health, safety, and welfare.

The funeral industry was an early convert to occupational licensing.[39] But licensing was only one of the ways the industry sought to raise prices. In 1881, American coffin makers founded the National Burial Case Association, which set prices for the whole industry. Two years later, the National Funeral Directors Association fixed the price of an adult coffin at $15, a large sum in the 19th century. Today, the national casket market is dominated by two corporations, York and Batesville, who together account for two-thirds of American coffin sales. Nationally, the funeral industry takes in about $25 billion per year.[40] This industry benefits tremendously from the fact that many customers are grieving the loss of a loved one when they purchase coffins or funeral services. But the industry benefits even more from excluding competition through occupational licensing.

Beginning in 1984, in response to new Federal Trade Commission regulations, entrepreneurs began selling caskets to the public directly at wholesale prices. By specializing and cutting out the middleman, these businesses could offer caskets to consumers at greatly

reduced rates. The FTC prohibited funeral homes from refusing to accept caskets from outside retailers,[41] and competition began to decrease prices and increase choice.

But this new economic freedom ran up against significant barriers. For many decades, the funeral industry had benefited from special legal privileges. Several states, for example, passed laws prohibiting the sale of caskets by anyone except a licensed funeral director. Under a 1972 Tennessee law, the practice of funeral directing was defined to include "the selling of funeral merchandise."[42] To sell a casket, therefore, one must first hold a funeral director's license. Becoming a funeral director was a major undertaking: an applicant was required either to attend Gupton College's 12- to 16-month training program for funeral directors (at a cost of more than $10,000), as well as serving a year in an apprenticeship, or to serve a 2-year apprenticeship and assist in 25 funerals. Only after these requirements were met could the applicant pay another $200 for the opportunity to take the Funeral Board examination.[43]

Nathaniel Craigmiles, a pastor who became frustrated at seeing his parishioners exploited by funeral homes, decided to open his own business selling caskets at discount prices. But Craigmiles was not a licensed funeral director, so the state soon began enforcement proceedings against him. He filed a lawsuit alleging that the licensing requirement limited his liberty to earn a living but had no sensible connection to public safety. Thus, it violated his constitutional rights as guaranteed by the privileges or immunities, due process, and equal protection clauses of the Fourteenth Amendment.

Although the district court acknowledged that because the Tennessee statute was an economic regulation it was subject only to low-yield "rational basis" review, it nevertheless held a full-scale trial to determine whether the law was actually rationally connected to public health and safety. Concluding that it lacked such connections, the court struck it down.[44] A coffin is simply a wooden box, wrote Judge R. Allan Edgar, and requiring retailers to go through such extensive training for licensure was absurd. Neither Craigmiles nor his partners were officiating at the funerals or constructing caskets. Although public health concerns about pollution of the ground due to faulty caskets might justify regulating their manufacture, no such concern was served by requiring *retailers* to be licensed. In fact, Tennessee law did not actually require that people be buried

in caskets at all, further undermining the allegation that the law protected public health. As the court concluded:

> [T]he purpose of promoting public health and safety is not served by requiring two years of training to sell a box. . . . [N]one of the training received by licensed funeral directors regarding caskets has anything to do with public health or safety. The training and the exam questions regarding caskets relate only to product information and merchandising. These topics have no relationship to health and safety, but might be helpful to one who sells any product. In sum, a casket does not differ from any other product in the marketplace. No health and safety reason rationally relates to requiring an individual to undergo two years of training, pay a fee, and pass a test in order to sell a casket.[45]

On appeal, the state argued that the district court had engaged in "*Lochner*ism" by substituting its own judgment for that of the legislature, but the court of appeals upheld the decision.[46] After reviewing the facts demonstrating that the Tennessee statute had little to do with protecting consumers, the court concluded that the state's proffered explanations for the law came close to "striking us with 'the force of a five-week-old, unrefrigerated dead fish.'"[47] It was simply absurd to see the law as anything other than "an attempt to prevent economic competition."[48] And this was not a proper goal: "Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose."[49] For the first time in almost 70 years, a federal court struck down a state economic regulation using the rational basis test.

But only six days after *Craigmiles* was decided, a federal trial court in Oklahoma issued a directly contrary ruling in an almost identical case. *Powers v. Harris*[50] involved an Internet-based retail casket company called Memorial Concepts Online, Inc., started by entrepreneurs Kim Powers and Dennis Bridges. Like Tennessee, Oklahoma law defines any person selling funeral merchandise as a funeral director and requires such a person to obtain a funeral director's license.[51] Getting a license in Oklahoma is nearly as onerous and expensive as it is in Tennessee: an applicant must complete at least 60 hours of study in an accredited college, graduate from an approved mortuary science program, and serve a year as a registered apprentice.[52]

Unlike the *Craigmiles* court, the trial court in *Powers* found this requirement rational.[53] Using the rational basis standard, the court said that judges must allow "any reasonably conceivable purpose [that the challenged] laws might serve," and not "evaluat[e] the effectiveness of a legislative measure" or "its economic benefits and detriments."[54] The court criticized the *Craigmiles* decision for using *Lochner*-style analysis and then upheld the Oklahoma licensing scheme, even though it was "not persuaded that the provisions in question advance the cause of consumer protection. Maybe they do and maybe they don't."[55] That question was unimportant, the court concluded, because even absent any evidence showing that the law could or did serve the public health, safety, and welfare, it was "readily conceivable that the licensing provisions challenged by the plaintiffs could have been thought by the legislature to promote the goal of consumer protection."[56] And that was all the rational basis test required.

The Tenth Circuit Court of Appeals upheld this decision, but went much further.[57] After a long recitation of the deference accorded to the government under the rational basis test, the court declared that it was "obliged to consider every plausible legitimate state interest that might support [the licensing requirement]—not just the consumer-protection interest forwarded by the parties."[58] The restriction would be upheld not only if it advanced consumer safety but also if "protecting the intrastate funeral home industry . . . constitutes a legitimate state interest."[59] This, the court held, was a proper government function: "intrastate economic protectionism constitutes a legitimate state interest."[60] Thus, the law was constitutional even though it had *nothing* to do with protecting the public: the legislature could also enact the restriction merely to grant economic favors to politically influential economic constituencies.

The *Powers* court based this extraordinary conclusion on three primary considerations. First, it noted that the *Craigmiles* decision had relied on three cases when declaring that mere protectionism was not a constitutional government purpose under the Fourteenth Amendment: *City of Philadelphia v. New Jersey*,[61] *H.P. Hood & Sons, Inc. v. Du Mond*,[62] and *Energy Reserves Group, Inc. v. Kansas Power & Light*.[63] But none of these was a Fourteenth Amendment case. Accusing the *Craigmiles* court of "selective quotation," the Tenth Circuit noted that *Du Mond* and *Philadelphia* involved the dormant

commerce clause, and *Energy Reserves Group* involved the contracts clause.[64] The dormant commerce clause has long been held to forbid states from discriminating against businesses located in other states but has not been read as having any relation to protectionist legislation *within* states. Within state boundaries, laws are subject only to the Fourteenth Amendment, and since the advent of rational basis review, the court noted, judges have frequently upheld laws that protect one industry against another *inside* a state.

But while this is true, the *Powers* court was ignoring the bigger picture illustrated by the cases that the *Craigmiles* court relied on: the ultimate purpose of the commerce clause, the contracts clause, and the Fourteenth Amendment's equal protection clause is to protect individual liberty. As Professor Sunstein has put it, these clauses are "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."[65] Although the federalist system does protect state sovereignty, it does so not as an end in itself, but as a means of securing individual freedom.[66]

Second, the *Powers* court held that applying a skeptical analysis of protectionist laws would threaten the validity of the post–New Deal regime: "adopting a rule against the legitimacy of intrastate economic protectionism and applying it in a principled manner" would require invalidating countless laws already on the books that perform no legitimate public function but merely protect one interest group from another.[67] Indeed, the court noted that economic protectionism is so common in state legislatures that "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[68] In short, because legislatures pass such measures so often, and have done so for so long, they must be constitutional. But this argument is a non sequitur. The mere fact that states frequently act in unconstitutional ways is hardly enough to make those acts constitutional: certainly segregation was a common state policy when it was finally held unconstitutional in the 1950s.

Because the *Powers* decision declares that providing economic favors for preferred groups is itself a legitimate state interest regardless of the effect that such laws may have on the public welfare, it is

not too much to say that the case was the most disastrous economic liberty decision since the New Deal. In previous cases upholding the constitutionality of economic restrictions, courts based their rulings on the theory that the law protected the public in *some* way, even if the connection was tenuous in the extreme. In many cases, such as the Louisiana florist case, the idea that the restriction protected the public was barely plausible, but in the end those cases still declared that economic liberty could be restricted only as a means of protecting the general public from some perceived harm. *Powers* was the first case in which a court held that the government could enact an economic regulation without *any* such connection at all, and *solely* to secure an economic benefit for those businesses the government prefers. If the legislature chooses to grant legal favors to one group over another *just because it wants to*, the law will nevertheless be upheld under *Powers*. The case was, in a sense, the mirror image of the substantive due process cases from a century before: anything the government chooses to do—even if it explicitly serves private interests rather than the general public good—is a legitimate law *simply because the government chose to do it*. In the eyes of the *Powers* court, law is not the use of government force in the service of some independent standard of public good but is instead the use of force in the service of arbitrary legislative will. What one writer has said when describing a different legal issue is equally applicable here: such a theory leads to "the legal enforcement of private bias, casting lawmaking as a kind of Nietzschean struggle of will, with various . . . interest groups trying to gain legal enforcement of their [desires] without having to give reasons."[69]

Obviously, the conclusion that protectionism is a legitimate state interest invites abuses in the service of irrational prejudice or favoritism. If a city chooses to grant a preference to, say, Target by outlawing Wal-Mart for no other reason than that the members of the city council prefer Target, then it can do so. Just as granting protection to licensed funeral directors was somehow a public goal because the legislature chose to adopt it, so protecting Target becomes a public goal simply because the city considers it worthy of protection. Of course, government officials will rarely if ever admit to acting in the interest of a private party; they will virtually always claim their acts are for the public welfare.[70] And whenever a private-interest group demands special favors from lawmakers, it always claims that the

public will ultimately benefit from subsidies to the interest group. If a business wants government to exclude its rivals, it will tell lawmakers that its rival is somehow a threat to the public welfare, or that the public will prosper if a monopoly is given to the private company. For example, the racists who agitated for laws restricting Chinese labor in 19th-century California claimed that white supremacy was good for society and that the Chinese were a "menace" to the public. Such self-serving disguises often dissolve in the light of common sense, but under the *Powers* decision, courts are not expected to apply common sense. If the legislature chooses to confer monopoly power to a lobbyist, that lobbyist's private interest becomes, ipso facto, the public interest.

Pest Control—or Economic Control?

A third illustrative occupational licensing case in the post–New Deal era challenged a requirement that applied to wildlife control workers, and the story of its litigation is an example of how difficult it is for businesses to defend themselves against protectionist schemes that powerful interest groups get translated into law.

Wildlife control workers trap the vertebrate pests that infest buildings, such as pigeons, rats, skunks, or raccoons, or they use spikes or screens to keep birds and squirrels away from buildings. They do not use pesticides, however, which they consider ineffective and dangerous. Alan Merrifield is a widely respected leader in the wildlife control trade. But when he sought a state contract to install anti-bird netting on a state office building in Oakland, California, he learned that under the state's Structural Pest Control Act, no person may install such nets without a "Branch 2 Structural Pest Control Operator" license. That license is only granted to people who pass the state's 200-question licensing examination, and to take the test, an applicant must first show proof that he or she has been employed for two years by a person with a license. More surprisingly, the exam has little to do with an applicant's knowledge of nonpesticide techniques of pest control. In fact, although a person must take and pass this test before putting spikes on a building to keep pigeons away, the examination does not contain a single question about pigeons, or about spikes. Instead, the exam is overwhelmingly devoted to testing an applicant's knowledge of the proper ways of handling, using, and

storing *pesticides*—pesticides Alan Merrifield and his fellow wildlife control workers do not use—and about how to deal with insects, spiders, and moths, which they do not treat.

Perhaps recognizing the perversity of forcing people who do not use pesticides to become experts on the use of pesticides, one state legislator sought to amend the law in 1995 to eliminate the licensing requirement for people who do not use pesticides. But when this proposal was announced, pest control workers who already had licenses feared that they might lose control over the industry, and they opposed the bill. One organization in particular, the Pest Control Operators of California, lobbied heavily against the bill. Its vice president later testified that industry lobbyists finally resolved the controversy by dividing up the pest control market. The expensive and time-consuming licensing requirement would be imposed on anyone dealing with pigeons, rats, and mice, since they make up the most lucrative part of the pest control trade; people like Merrifield would then be allowed to deal with only the less common pests like raccoons and squirrels.[71] This effort to cartelize the market for pest control services succeeded: the legislature altered the 1995 bill so that it allowed pest control workers who chose not to use pesticides to do their business without undergoing unnecessary and expensive training in pesticide use—unless their work involved pigeons, rats, and/or mice! In other words, if Merrifield installed a screen on a building to keep a raccoon out, he did not need a license, but if he installed the *same* screen on the *same* building to keep a *rat* out, he needed to spend two years learning to use pesticides and take a difficult and time-consuming test about the lifespan of insects and the dangers of chemical poisons.

Asked for an explanation of this bizarre scheme, the state's expert witness testified under oath that the law was "a political piece of legislation in order to make a particular constituency happy, *but it harms the consumer* because the consumer ends up with somebody coming in and doing what has traditionally been a behavior that requires a professional license."[72] He acknowledged that it made no sense to require a license for trapping or excluding pigeons, rats, and mice, but not for trapping or excluding any other kind of pest:

> Q: Does it protect the public health and safety to require a person who does pigeon exclusion work without pesticides in structures to have a . . . license?

Mr. Paulsen: Absolutely.

Q: Does it protect the public health and safety not to require the same license for seagull exclusion work?

Mr. Paulsen: No, it does not.

Q: Would you call this irrational?

Mr. Paulsen: Yes, I would.[73]

Asked a third time to explain the licensing scheme, he reiterated, "[F]rom a public perspective, it might be irrational."[74]

Nevertheless, despite the plain absurdity of the law's requirements and regardless of the fact that the state's own expert witness testified repeatedly that the licensing scheme was positively irrational, the trial court still upheld the law.[75] Requiring a license for excluding pigeons but not seagulls was rational, wrote Judge William Schwarzer, because the legislature might have concluded "that rats, mice, and pigeons are overwhelmingly the most common vertebrate pests infesting structures."[76] Yet if this were the purpose of the restriction, it made no sense that the test included no questions at all about pigeons and next to none about rats or mice. Still, Schwarzer continued, the legislature might have thought that "requiring that pest control operators be knowledgeable about alternative methods of control, about the public health hazards posed by pests, and about ways of protecting themselves and the public from pesticides previously applied by others" would protect the public and advance the public interest.[77] But this rationale was inconsistent with the fact that practitioners dealing with other kinds of animals were not required to have such training—so that a professional might show up at a person's house to treat a bat infestation, knowing nothing whatsoever about the pesticides previously applied to that structure by others.

The *Merrifield* decision shows the lengths to which courts can go and the contortions in logic courts perform under the rational basis test. The undisputed evidence established that the bizarre pest control licensing scheme was designed simply to protect licensed practitioners against competition from outsiders, not to protect the public health and safety. The state's expert witness testified that the

licensing scheme was positively irrational. Yet the rational basis test allowed the court to ignore all the evidence and manufacture its own, self-contradictory justification for the law.

Fortunately for Merrifield, and entrepreneurs in general, the Ninth Circuit Court of Appeals reversed this decision. In a 2–1 opinion, Judge Diarmuid F. O'Scannlain concluded that "just as in *Craigmiles*, the licensing scheme in this case . . . was designed to favor economically certain constituents at the expense of others similarly situated, such as Merrifield."[78] The justifications that the state offered for the licensing requirements were "so weak that [they] undercut[] the principle of non-contradiction"[79] and revealed that the real purpose of the law was to divide up the trade in a way that benefited political insiders. And this the court explicitly declared unconstitutional:

> [M]ere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review. In doing so, we agree with the Sixth Circuit in *Craigmiles* and reject the Tenth Circuit's reasoning in *Powers v. Harris*. . . . We do not disagree that there might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review. However, economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.[80]

Now that the courts of appeal are in conflict over this issue, with the Tenth Circuit upholding protectionism as a legitimate purpose for occupational licensing and the Sixth and Ninth Circuits disagreeing, the stage is set for the Supreme Court to resolve the issue definitively in some future case.

Zoning

Wal-Mart is one of the great American success stories. Not only does it demonstrate how a new idea can prevail against the common assumptions of the business world, but it also shows how a business can grow by providing customers with the products they need at prices they can afford. Today, it is the largest company in the world, and it employs more people than any other employer in the United States (except the government, of course). Wal-Mart makes more

is whatever result just procedures have led to." Menand, *The Metaphysical Club* (New York: Farrar, Strauss, and Giroux, 2001), p. 432.

36. *Beach Communications*, 508 U.S. at 323 n. 3 (Stevens, J., concurring in judgment).

37. *S.S. Kresge Co. v. Couzens*, 290 Mich. 185, 192 (1939).

38. Ibid.

39. *Meadows v. Odom*, 360 F. Supp. 2d 811, 823–24 (M.D. La. 2005), *vacated as moot*, 198 Fed. Appx. 348 (5th Cir. 2006).

40. *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 (1938).

41. Victoria F. Nourse makes a powerful argument that this evolution began with *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), a case invalidating an Oklahoma law that required the forced sterilization of prison inmates. Nourse, *In Reckless Hands:* Skinner v. Oklahoma *and the Near-Triumph of American Eugenics* (New York: W. W. Norton, 2008), especially chap. 9. No single case, however, indicates the Court's change in direction. Beginning in the World War II era, the Court shifted from the almost total deference of New Deal cases like *Nebbia* toward a higher scrutiny—not in cases involving class legislation, as with the pre–New Deal cases, but in cases involving what the justices considered to be important rights of personal dignity or democratic participation. Also indicative of this shift is *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), which abandoned the extreme deference of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). See Epstein, *Progressives*, pp. 100–16.

42. Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* (University Park: Pennsylvania State University Press, 1996), pp. 156–57.

43. Laurence Tribe, *American Constitutional Law*, 2nd ed. (Mineola, NY: Foundation Press, 1988), p. 1374.

44. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

45. Cf. Ludwig von Mises, *The Anticapitalistic Mentality* (Grove City, PA: Libertarian Press, 1972); and F. A. Hayek, "The Intellectuals and Socialism," *University of Chicago Law Review* 16 (1949): 417–33.

46. *United States v. Carlton*, 512 U.S. 26, 41–42 (1994) (Scalia and Thomas, JJ., concurring in judgment).

47. *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007); *Williams v. Attorney General of Ala.*, 378 F.3d 1232 (11th Cir. 2004); and *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988 (7th Cir. 2002). See also *This That and the Other Gift and Tobacco, Inc. v. Cobb County, Ga.*, 439 F.3d 1275 (11th Cir. 2006) (challenging law against advertising adult novelties).

48. *Williams*, 478 F.3d at 1322.

49. *Lawrence*, 539 U.S. at 571.

50. *Kelo v. City of New London*, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting).

51. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985).

52. *Romer v. Evans*, 517 U.S. 620 (1996).

53. Ibid. at 632–33.

54. As one commentator puts it, these are "'true rational basis' cases because they involve a true search for rationality." Donald Marritz, "Making Equality Matter (Again): The Prohibition against Special Laws in the Pennsylvania Constitution," *Widener Journal of Public Law* 3 (1993): 176.

55. *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

56. Robert G. McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," *Supreme Court Review*, 1962: 34–62.

57. Ibid.

Chapter 7

1. Quoted in R. H. Coase, *The Firm, the Market and the Law* (Chicago: University of Chicago Press, 1990), p. 196.

2. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

3. Ibid. at 278–79.

4. Ibid. at 278 (quoting *Burns Baking Co. v. Bryan*, 264 U. S. 504, 513 (1924)).

5. Ibid. at 311 (Brandeis, J., dissenting).

6. Ibid. at 279–80. Justice Jackson would make a similar point almost 20 years later in *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 546 (1942): "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority."

7. *Liebmann*, 285 U.S. at 279–80.

8. *Jones v. Temmer*, 829 F. Supp. 1226 (D. Colo. 1993), *vacated as moot*, 57 F.3d 921 (10th Cir. 1995).

9. Hadley Arkes, *The Return of George Sutherland* (Princeton, NJ: Princeton University Press, 1994), p. 55.

10. *Dent v. West Virginia*, 129 U.S. 114 (1889).

11. Ibid. at 122.

12. Ibid.

13. *Schware v. Bd. of Bar Examiners of the State of N.M.*, 353 U.S. 232, 239 (1957).

14. Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York: Touchstone, 2005), pp. 340–46.

15. *Debates and Proceedings of the Constitutional Convention of the State of California* (Sacramento: State Printing Office, 1880), vol. 1, p. 633.

16. Quoted in Stephen A. Ambrose, *Nothing Like It in the World* (New York: Simon & Schuster, 2000), p. 153.

17. Jean Pfaelzer, *Driven Out: The Forgotten War against Chinese Americans* (New York: Random House, 2007), especially chap. 2.

18. G. B. Willis and P. K. Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California* (Sacramento: State Printing Office, 1880), p. 727.

19. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

20. Ibid. at 368.

21. Ibid. at 370.

22. Ibid. at 373–74.

23. Ibid. at 370.

24. David E. Bernstein, "*Lochner*, Parity, and the Chinese Laundry Cases," *William & Mary Law Review* 41 (1999): 244–50.

25. David E. Bernstein, *Only One Place of Redress: African-Americans, Labor Regulations and the Courts from Reconstruction to the New Deal* (Durham, NC: Duke University Press, 2001), especially chap. 2.

26. *Replogle v. City of Little Rock*, 267 S.W. 353, 357 (Ark. 1924) (quoting *Lochner v. New York*, 198 U.S. 45, 64 (1905)).
27. Ibid. at 356.
28. Bernstein, *Only One Place of Redress*, p. 35.
29. Thurgood Marshall, "The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws," in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences*, ed. M. Tushnet (Chicago: Lawrence Hill Books, 2001), pp. 119–20.
30. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1105 (S.D. Cal. 1999).
31. *Cornwell v. California Bd. of Barbering and Cosmetology*, 962 F. Supp. 1260, 1277 (S.D. Cal. 1997).
32. See further Clark Neily, "No Such Thing: Litigating under the Rational Basis Test," *New York University Journal of Law and Liberty* 1 (2005): 898–914.
33. Timothy Sandefur, "Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries," *William & Mary Bill of Rights Journal* 14 (2006): 1061.
34. Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 148.
35. Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (Kalamazoo, MI: Upjohn Institute, 2006); S. David Young, *The Rule of Experts* (Washington: Cato Institute, 1987); Mario Pagliero, "What Is the Objective of Professional Licensing? Evidence from the US Market for Lawyers," University of Turin working paper, January 2005, http://www.fep.up.pt/conferences/earie2005/cd_rom/Session%20II.G/Pagliero.pdf (accessed June 18, 2005); David E. Bernstein, *Only One Place of Redress*, chap. 2; David E. Bernstein, "Licensing Laws: A Historical Example of the Use of Government Regulatory Power against African-Americans," *San Diego Law Review* 31 (1994): 89–104; Jonathan Rose, "Occupational Licensing: A Framework for Analysis," *Arizona State Law Journal* (1979): 189–202; Lawrence Shepard, "Licensing Restrictions and the Cost of Dental Care," *Journal of Law and Economics* 21 (1978): 187–201; Kathleen Sowle Stolar, "Occupational Licensing: An Antitrust Analysis," *Missouri Law Review* 41 (1976): 66–79; Walter Gellhorn, "The Abuse of Occupational Licensing," *University of Chicago Law Review* 44 (1976): 6–27; Alex Maurizi, "Occupational Licensing and the Public Interest," *Journal of Political Economy* 82 (1974): 399–413; "Note: Due Process Limitations on Occupational Licensing," *Virginia Law Review* 59 (1973): 1097–129; Thomas G. Moore, "The Purpose of Licensing," *Journal of Law and Economics* 4 (1961): 93–117; J. A. C. Grant, "The Gild Returns to America," *Journal of Politics* 4 (1942): 303–36, 458–77; and David Fellman, "A Case Study in Administrative Law: The Regulation of Barbers," *Washington University Law Quarterly* 26 (1941): 213–42.
36. Morris M. Kleiner, "Occupational Licensing," *Journal of Economic Perspectives* 14 (2000): 196.
37. Chris Cassidy, "Salem Struggles to Sort Out Psychic 'Free-for-All,'" *Salem News*, May 24, 2007, http://www.associatedcontent.com/article/283540/the_future_looks_good_for_palm_readers.html; and Dina Cardin, "The Futures Market," *North Shore Online*, June 15, 2007, http://www.townonline.com/northshoresunday/homepage/x504545030.
38. It is ironic, therefore, that one of the most important law review articles on economic liberty in the post–New Deal era was Robert McCloskey's "Economic Due Process and the Supreme Court: An Exhumation and Reburial," *Supreme Court Review* (1962): 34–62.

39. Lawrence M. Friedman, *History of American Law*, p. 341.
40. Institute for Justice, "The Right to Urn an Honest Living: Challenging Tennessee's Casket Monopoly," http://www.ij.org/index.php?option=com_content&task=view&id=767&Itemid=165.
41. 59 *Fed. Reg.* 1592, 1593 (1994). This regulation prohibits funeral homes from charging "handling fees," which are simply surcharges meant to discourage customers from purchasing caskets outside of the funeral home. But the regulation is routinely flouted.
42. Tenn. Code Ann. § 62-5-101(3)(A)(ii).
43. Rules of the Tennessee Board of Funeral Directors and Embalmers, http://www.state.tn.us/sos/rules/0660/0660-03.pdf (accessed April 18, 2003).
44. *Craigmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000).
45. Ibid. at 663.
46. *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).
47. Ibid. at 225 (quoting *United States v. Sauran*, 259 F.3d 434, 447 (6th Cir. 2001)).
48. Ibid.
49. Ibid. at 224.
50. *Powers v. Harris*, 2002 WL 32026155 (W.D. Okla. December 12, 2002), *aff'd*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1638 (2005).
51. 59 O.S. §§ 396.2.2.d, 396.3a.
52. 59 O.S. § 396.6.b. Unlike Tennessee law, the Oklahoma law does not appear to allow any way around the apprenticeship requirement.
53. *Powers* therefore was decided in direct contradiction to *Craigmiles*. Although it typically grants certiorari in cases in which the federal courts of appeal are divided, the U.S. Supreme Court denied certiorari in *Powers*, 125 S. Ct. 1638 (2005), and the division remains unresolved.
54. *Powers*, 2002 WL 32026155 at *15.
55. Ibid. at *18.
56. Ibid.
57. *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004).
58. Ibid. at 1218.
59. Ibid.
60. Ibid. at 1221.
61. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).
62. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949).
63. *Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 411 (1983).
64. *Powers*, 379 F.3d at 1219.
65. Cass R. Sunstein, "Naked Preferences and the Constitution," *Columbia Law Review* 84 (1984): 1689.
66. See Clinton Rossiter, ed., *The Federalist Papers* (New York: New American Library, 1961), no. 45, p. 288; and Clint Bolick, *Grassroots Tyranny* (Washington: Cato Institute, 1993), pp. 13–52.
67. *Powers*, 379 F.3d at 1222.
68. Ibid.
69. Peter M. Cicchino, "Reason and the Rule of Law: Should Bare Assertions of 'Public Morality' Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?" *Georgetown Law Journal* 87 (1998): 178.

70. During the debates over the ratification of the Constitution, "Brutus" made the point well when discussing the "general welfare" clause of the Constitution: "It is as absurd to say, that the power of Congress is limited by these general expressions, 'to provide for the common safety, and general welfare,' as it would be to say, that it would be limited, had the constitution said they should have power to lay taxes, &c. at will and pleasure. Were this authority given, it might be said, that under it the legislature could not do injustice, or pursue any measures, but such as were calculated to promote the public good, and happiness. For every man, rulers as well as others, are bound by the immutable laws of God and reason, always to will what is right. It is certainly right and fit, that the governors of every people should provide for the common defence and general welfare; every government, therefore, in the world, even the greatest despot, is limited in the exercise of his power. But however just this reasoning may be, it would be found, in practice, a most pitiful restriction. The government would always say, their measures were designed and calculated to promote the public good; and there being no judge between them and the people, the rulers themselves must, and would always, judge for themselves." Bernard Bailyn, *The Debate on the Constitution* (New York: Library of America, 1993), vol. 1, pp. 618–19.

71. Transcript of deposition of Eric Paulsen, *Merrifield, et al. v. Lockyer, et al.*, April 19, 2005, pp. 115–16 (on file with author).

72. Ibid., p. 45 (emphasis added).

73. Ibid., pp. 46–47.

74. Ibid., p. 149.

75. *Merrifield v. Lockyer*, 388 F. Supp. 2d 1051 (N.D. Cal. 2005).

76. Ibid. at 1058.

77. Ibid.

78. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).

79. Ibid.

80. Ibid. at 991, n. 15.

81. "Wal-Mart 2007 Annual Report," Wal-Mart Stores, Inc., Bentonville, AR, http://walmartstores.com/Media/Investors/2007_annual_report.pdf.

82. Richard Vedder and Wendell Cox, *The Wal-Mart Revolution: How Big-Box Stores Benefit Consumers, Workers, and the Economy* (Washington: AEI Press, 2006).

83. Eric R. Claeys, "*Euclid* Lives? The Uneasy Legacy of Progressivism in Zoning," *Fordham Law Review* 73 (2004): 731–70.

84. Anthony B. Sanders, "The 'New Judicial Federalism' before Its Time: A Comprehensive Review of Economic Substantive Due Process under State Constitutional Law since 1940 and the Reasons for Its Recent Decline," *American University Law Review* 55 (2005): 457–540.

85. George Lefcoe, "The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes between Wal-Mart and the United Food and Commercial Workers Union," *Arkansas Law Review* 58 (2006): 842; Ted Balaker, "Ban Wal-Mart, Hurt Families," *Los Angeles Daily News*, January 26, 2004; Julian Sanchez, "The Wal-Mart Crusade: Big-Boxing a Mega-Retailer's Ears," *Reason*, March 2006; and RiShawn Biddle, "Sam's Curse: Will Wal-Mart Superstores Really Devastate the City of Angels?" *Reason.com*, March 18, 2004, http://reason.com/archives/2004/03/18/sams-curse.

86. *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 283 (2006).

87. Ibid. at 301.

88. Ibid.

89. Ibid. at 303.

90. Minutes of Hanford City Council, March 4, 2003 (on file with author).

91. Minutes of Hanford City Council, April 15, 2003 (on file with author).

92. Letter from Rusty C. Robinson to Hanford City Council, March 4, 2003 (on file with author).

93. Minutes of Hanford City Council, March 4, 2003 (on file with author).

94. *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 296 (2007).

95. Ibid. at 297 (emphasis in original).

96. Adrian Hernandez's case bears a striking resemblance to the notorious decision regarding eminent domain in *Kelo v. City of New London*, 545 U.S. 469 (2005). There, the U.S. Supreme Court declared that local officials may condemn private property and transfer it to developers to construct shopping centers or luxury condominiums for their own profit because doing so creates jobs, which is a public benefit rather than a private benefit. Yet the Court insisted that taking property for a purely private benefit was still unconstitutional. Ibid. at 477–78. While this sounds nice, it is meaningless because every *private* business will "create jobs" or provide *some* sort of public benefits. If anything that benefits the public in *some* way, no matter how attenuated, can qualify as a "public benefit," it will be impossible to declare any condemnation unconstitutional for serving "private" benefits. The *Hernandez* decision is *Kelo* for zoning laws: government may control or eliminate fair economic competition in whatever way it wants, so long as it claims that some sort of vague public benefit will result from its actions.

97. Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* (New York: HarperCollins, 2007), pp. 153–54; and Ashley Sellers and Jesse E. Baskette Jr., "Agricultural Marketing Agreement and Order Programs, 1933–1944," *Georgetown Law Journal* 33 (1945): 123–52.

98. Henry Hazlitt, *Economics in One Lesson* (San Francisco: Laissez-Faire Books, 1996), pp. 79–80.

99. Dennis Pollock, "Raisin Case Awaits a Ruling; Kerman Couple Are Accused of Breaking Rules," *Fresno Bee*, February 12, 2005, p. D1 (2005 WLNR 2050449).

100. Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601–74.

101. Tracy Correa, "USDA Accuses Growers: Kerman Couple Face Complaint over Raisin Marketing Order," *Fresno Bee*, April 3, 2004, p. D1 (2004 WLNR 20529366).

102. Leon Garoyan, "Marketing Orders," *UC Davis Law Review* 23 (1990): 705.

103. Lawrence Shepard, "Cartelization of the California-Arizona Orange Industry, 1934–1981," *Journal of Law & Economics* 29 (1986): 120. See also Dennis M. Gaab, "The California-Arizona Citrus Marketing Orders: Examples of Failed Attempts to Regulate Markets for Agricultural Commodities," *San Joaquin Agricultural Law Review* 5 (1995): 147.

104. Ron Paarlberg, "The Political Economy of American Agricultural Policy: Three Approaches," *American Journal of Agricultural Economics* 71 (1989): 1161.

105. Neil Brooks, "The Pricing of Milk under Federal Marketing Orders," *George Washington Law Review* 26 (1958): 181–213; Kevin McNew, "Milking the Sacred Cow: A Case for Eliminating the Federal Dairy Program," Cato Institute Policy Analysis no. 362, December 1, 1999; William N. Eskridge Jr., "Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation," *Virginia Law Review*

Appendix B

CARTELS BY ANOTHER NAME:
SHOULD LICENSED OCCUPATIONS FACE ANTITRUST SCRUTINY?

Aaron Edlin† *and Rebecca Haw*††

Forthcoming, University of Pennsylvania Law Review

ABSTRACT

It has been over a hundred years since George Bernard Shaw wrote that "All professions are a conspiracy against the laity." Since then the number of occupations and the percentage of workers subject to occupational licensing has exploded; nearly one third of the U.S. workforce is now licensed, up from five percent in the 1950s. Through occupational licensing boards, states endow cosmetologists, veterinary doctors, medical doctors, or florists, with the authority to decide who may practice their art. It can't surprise when licensing boards comprised of competitors exclude competition and regulate in ways that raise their profit. The result for consumers is higher prices and less choice, as licensing raises wages by 18% and bars competition from unlicensed workers. For African-style hair braiders, the result is either an illicit business or thousands of hours of irrelevant training imposed by a cosmetology board. For lawyers, the result is less competition from tax accountants, paralegals and out of state lawyers.

The great accomplishment of the Sherman Act has been to make cartels per se illegal and relatively scarce. Unless the cartel is managed by a professional licensing board. Most jurisdictions consider such boards, as creations of states, to be exempted from antitrust scrutiny by the state action doctrine, leaving would-be competitors and consumers no recourse against their cartel activity.

We contend that the state action doctrine should not prevent antitrust suits against state licensing boards that are composed of private competitors deputized to regulate their own competition and to outright exclude those who compete with them, often with the threat of criminal sanction. At most, state action should immunize licensing boards from the per se rule and require plaintiffs to prove their case under the rule of reason. We argue that the Fourth Circuit's recent case upholding an FTC antitrust suit against a licensing board—creating a circuit split and becoming the only circuit to deny state action immunity to a licensing board—is a step in the right direction but not far enough. The Supreme Court should take the split as an opportunity to clarify that when competitors hold the reins to their own competition, they must answer to Senator Sherman.

---

† Richard Jennings Professor of Law and Professor of Economics, UC Berkeley; Research Associate, National Bureau of Economic Research; J.D., Stanford University; Ph.D., Economics, Stanford University.

†† Assistant Professor of Law, Vanderbilt; J.D., Harvard University.

TABLE OF CONTENTS

All professions are a conspiracy against the laity.
George Bernard Shaw, *The Doctor's Dilemma (1906)*

INTRODUCTION

The Sherman Act has one principal success: Cartels and their smoke-filled rooms, where competitors agree to waste economic resources for their own industry's benefit, are unambiguously and uncontroversially illegal in the United States.[1] Unless that industry is a profession and that cartel is a state licensing board. Little noticed, licensing boards have grown into a massive exception to the ban on cartels.

Licensing boards are dominantly comprised of active members of the industry who meet to agree on ways to limit the entry of new competitors.[2] Some boards use their power to limit price competition or restrict the quantity of services available.[3] But professional boards, unlike cartels in commodities or consumer products, are sanctioned by the state—even considered *part* of the state[4]—and so are often assumed to operate outside the reach of the Sherman Act under a line of Supreme Court cases starting with *Parker*.[5]

When only five percent of American workers were subjected to licensing requirements,[6] the anticompetitive effect of these state-sanctioned cartels was relatively small. Now, nearly a third of American workers need a state license to perform their job legally, and this trend is continuing.[7] The service sector—the most likely to be covered by licensing—now represents four-fifths of U.S. GDP and is the sector with the strongest job growth.[8] Some of the recent additions

---

[1] The loud and lively debate about the Sherman Act's reach beyond this uncontroversial core tends to obscure this simple yet powerful success of §1.

[2] *See* Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPECTIVES 189, 191 (2000); *see also infra*, TAN 38&39 and Appendix.

[3] *See* MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 65--67 (2006).

[4] *See* Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272, 275 (9th Cir. 1982).

[5] Parker v. Brown, 317 U.S. 341, 351 (1943) ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.")

[6] KLEINER, *supra* note 3, at 1.

[7] Morris Kleiner & Alan Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LABOR ECON., (2013, forthcoming)..

[8] CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK (2012), *available at* https://www.cia.gov/library/publications/the-world-factbook/fields/2012.html

include locksmiths, bee keepers, auctioneers, interior designers, fortune tellers, tour guides and shampooers.[9]

Boards have abused their power to insulate incumbents from competition. On average, cosmetologists are required to have ten times as many days of training as EMTs.[10] In Louisiana, unlicensed floral design is a criminal offense.[11] In Oklahoma one must take a year of coursework on funeral service including embalming and grief counseling just to sell a casket, while burial without a casket at all is perfectly legal.[12] Even the traditionally licensed occupations, the so-called "learned professions," use licensing restrictions to repress competition. For example, all states impose some restrictions on lawyer advertising, and some even prevent truthful claims about low prices.[13] In many states dentists cannot legally employ more than two hygienists each, a restriction that raises demand for dentists.[14] In some states, nurse practitioners must be supervised by a physician,[15] even though there is no empirical evidence that supervision improves patient outcomes.

Labor economists have shown that the net effect of licensing on quality is equivocal.[16] What is not equivocal, according to their empirical studies, is the effect of licensing on consumer prices. Morris Kleiner, the leading economist studying the effects of licensing on price and quality of service, estimates the annual cost of

---

[9] Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J., Feb. 7, 2011, A1 (citing examples of locksmiths and shampooers); Clark Neily, *Watch Out for That Pillow*, WALL ST. J., April 1, 2008, at A17 (citing example of interior designers);). Freedom du Lac, *Regulating Guides' Right to Talk to Tourists?*, WASH. POST, Sept. 27, 2010, B04 (citing example of tour guides); Dick Carpenter and Lisa Knepper, *Do Barbers Really Need a License?*, WALL ST. J., May 11, 2012, at A13 (citing example of auctioneers); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976) (citing example of bee keepers); Emily Sweeney, *Town Denies Fortune-teller License*, BOSTON GLOBE, May 9, 2004.

[10] The Institute for Justice, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 29 [LICENSE TO WORK], *available at*: www.ij.org/LicenseToWork (reporting that states require an average of thirty-three days of training for EMTs, but 372 days for cosmetologists). Arkansas, for instance, requires 28 days of training for EMTs and 350 for cosmetologists. *Id.* at 42.

[11] Neily, *supra* note 9. (observing that unlicensed businesses can be "effectively shut down with threats of fines, injunctions or even criminal prosecution.").

[12] *See Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004).

[13] LexisNexis 50 State Comparative Legislation/Regulations, *Attorney Advertising* (May 2011) ("Every state regulates the advertising of its attorneys."). Ohio Rules of Professional Conduct, Rule 7.1 comment 4, *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf.

[14] BUREAU OF ECONOMICS STAFF REPORT TO THE FEDERAL TRADE COMM'N, RESTRICTIONS ON DENTAL AUXILIARIES: AN ECONOMIC POLICY ANALYSIS 6 (May 1987), *available at* http://www.ftc.gov/be/econrpt/232032.pdf;

[15] *See* SHARON CHRISTIAN & CATHERINE DOWER, SCOPE OF PRACTICE LAWS IN HEALTH CARE: RETHINKING THE ROLE OF NURSE PRACTITIONERS 3 (January 2008) (noting that 30 states require at least some degree of physician supervision or collaboration), *available at* http://www.chcf.org/~/media/MEDIA%20LIBRARY%20Files/PDF/S/PDF%20ScopeOfPracticeLawsNursePractitionersIB.pdf; Tracy A. Klein, *Scope of Practice and the Nurse Practitioner: Independent, Collaboration, Supervision: How is Your Scope Regulated?*, MEDSCAPE (June 15, 2005), http://www.medscape.org/viewarticle/506277_5 (last updated October 17, 2007) ("[Twenty-three] states require no physician involvement for the licensed NP to diagnose and treat, while the remainder of states require some degree of written or formal physician involvement in NP practice.")

[16] *See* CAROLYN COX & SUSAN FOSTER, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 21-27, 40 (1990), *available at* http://www.ramblemuse.com/articles/cox_foster.pdf.

licensing to consumers at $116 billon.[17] And consumers are not the only losers, since more licensing means fewer jobs.[18] All this said, we make no claim that all licensing rules are harmful. Some no doubt improve quality and public safety enough to be worth the costs. The point is that many do not.

Thanks in part to a spate of stories in mainstream news outlets like the New York Times,[19] the Wall Street Journal,[20] NPR,[21] and even the Daily Show,[22] politicians are taking notice of the growing problem. In early 2013, Massachusetts governor Deval Patrick announced a set of "common-sense changes in the Division of Professional Licensure" designed to improve the business climate in his state.[23] Patrick only proposed modest changes[24] perhaps because an attempt at more dramatic licensing reform by Florida Governor Rick Scott failed in 2011.[25] The White House has also taken a stand against excessive licensing. President Obama recently named Alan Krueger, a labor economist whose empirical work highlights some of the anticompetitive effects of licensing, as Chair of the President's Council of Economic Advisers, and Krueger has taken an interest in loosening up licensing regulations. And as a part of her "Joining Forces" initiative, Michelle Obama has successfully lobbied 24 states to sign legislation recognizing interstate reciprocity for professionally licensed military spouses.[26] Even Congress has started paying attention. In 2010 the House commissioned a report on the effect of healthcare worker licensing on the affordability of care; the report advised streamlining license requirements and allowing for interstate reciprocity.[27]

Despite wide recognition of the potential for economic harm from allowing professions to control their licensing rules and define the scope of their art, real reform is elusive. Part of the reason is that in the professional licensing context, the most powerful legal tool against anticompetitive activity appears unavailable. Most jurisdictions interpret antitrust federalism to shield licensing boards from the Sherman Act despite the fact that the boards often look like and act like §1's

---

[17] KLEINER, *supra* note 3, at 115.

[18] *See* Kleiner and Krueger, *supra* note 7, at 8.

[19] Jacob Goldstein, *So You Think You Can Be a Hair Braider*, N.Y. TIMES MAG., June 17, 2012, at 20.

[20] Simon, *supra* note 9.

[21] *Morning Edition: Why It's Illegal to Braid Hair Without a License*, National Public Radio (June 21, 2012).

[22] The Daily Show with Jon Stewart, The Braidy Bill (Comedy Central June 3, 2004), available at http://www.thedailyshow.com/watch/thu-june-3-2004/the-braidy-bill.

[23] Press Release, Massachusetts Governor's Office, *Governor Patrick Builds on Regulatory Reform Successes; Files Legislation to Improve Business Climate For Licensed Professionals* (January 07, 2013, *available at* http://www.mass.gov/governor/pressoffice/pressreleases/2013/0107-regulatory-reform.html

[24] Patrick proposed combining the cosmetology and barbering board under one roof and eliminating the board of radio and television technicians. *Id.*

[25] Chip Mellor and Dick Carpenter, *Want Jobs? Cut Local Regulations*, Wall St. J., July 28, 2011, at A15. Michigan governor Rick Snyder has made similar promises. *See* Carpenter & Knepper, *supra* note 9.

[26] Executive Office of the President, Military Skills for America's Future: Leveraging Military Service and Experience to Put Veterans and Military Spouses Back to Work 20-21, May 31, 2012, *available at* http://www.whitehouse.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf.

[27] U.S. Dep't of Health and Human Services, Health Resources and Services Administration, *Health Licensing Board Report to Congress*, http://www.hrsa.gov/ruralhealth/about/telehealth/licenserpt10.pdf

principal target. Other avenues for reform, including constitutional suits asserting the rights of would-be professionals, have done little to slow or reverse the trend towards cartelized labor markets.

Last year, in North Carolina Board of Dental Examiners v. FTC,[28] the Fourth Circuit upheld an FTC decision holding a state licensing board liable for Sherman Act abuses, creating a circuit split and becoming the only circuit to actually expose a licensing board to antitrust scrutiny. The case is a step in the right direction, but because it relied on the method of appointment of the board—not just on the identity of its members as competitors—it does not go far enough. The Supreme Court should take the split as an opportunity to hold boards composed of competitors to the strictest version of its test for state action immunity, regardless of how its members were appointed. This test—the *Midcal* test—requires that, to enjoy state action immunity from antitrust liability, private actors must act pursuant to the state's clearly articulated purpose to displace competition and be subject to active supervision by the state. Where a board fails either prong of this test, courts should subject the board's actions to antitrust scrutiny applying a modified rule of reason..

Our proposal would recognize the potential benefits of licensing—preventing charlatanism and injury to the public—but reject the idea that potential benefits can justify total antitrust immunity for licensing. We advocate for an approach that uses the potential benefits of licensing to influence *how* restrictions will be reviewed, not *whether* they will be reviewed at all. And although our proposal involves a shift in the dominant interpretation of state action doctrine, the Supreme Court's unanimous opinion last term in *FTC v. Phoebe Putney* demonstrated its appetite for stopping cartel-like abuses of antitrust immunity.[29] So the time is right.

---

[28] 717 F.3d 359 (4th Cir. 2013)

[29] Last term the Supreme Court decided 9-0 to narrow state action immunity in FTC v. Phoeby Putney 568 U.S. ___ (2013). In this case, a local government entity (the Hospital Authority of Albany-Dougherty County) purchased a hospital, thereby changing a market from two competing hospitals to monopoly provision. The state of Georgia granted the Hospital Authority a variety of powers including the power to buy hospitals. Because *Hallie* held that substate governmental entities do not require supervision to trigger immunity, the question in Phoeby Putney was whether the state had clearly articulated a policy of anticompetitive merger to monopoly when it granted the Authority the authority to buy hospitals. The Court took the position that the state had done no such thing, reasoning that although the Authority was entrusted with the provision of medical care and the means to provide medical care, which may involve purchasing hospitals, that power could be exercised without raising competitive issues so the grant of this power did not implicitly and necessarily contemplate anticompetitive use. The court also emphasized that state action exemptions should be disfavored, quoting its prior language from Ticor to this effect. ("state-action immunity s disfavored, much as are repeals by implication." FTC v. Ticor Title Ins. Co. 504 U.S. 621, 636) .

How does *Phoeby Putney* affect future cases involving licensing boards?
To the extent that licensing board cases are about supervision, which is our focus, *Phoeby Putney*'s relevance to state action immunity for licensing boards is indirect. It mainly demonstrates an appetite for narrow readings of state action and a reiteration of *Ticor*'s language that state action immunities are disfavored and should be narrowly construed. The FTC's success in its argument that the "clear articulation" prong was not met would be much more difficult in the context of professional licensing.

This Article proceeds in five parts. Part I details the expansion of licensing in the United States and gives examples of its excesses. Part II explains how the current crisis arose, first summarizing the economics of licensing and then surveying the legal landscape that allowed its relatively unfettered expansion. In the next Part, we make our normative case for Sherman Act liability for state licensing boards, arguing that there is a logical fit between antitrust policy and the economic harm of heavy-handed licensing. We also address antitrust federalism, claiming that deference to state decision-making is especially difficult to justify in the context of occupational licensing. Part IV details the mechanics of the regime we propose. We suggest that in the licensing context, the rule of reason should be modified to allow defendants to place on the pro-competitive side of the scale evidence that the restraint improves safety or quality, an argument traditionally out-of-bounds in a §1 case. Part IV then discusses the parties, damages, and defenses that would be involved in a licensing board suit and speculates about likely state responses to the new regime. Part V concludes.

I. OCCUPATIONAL LICENSING BOARDS: THE NEW CARTELS

Once limited to a few learned professions, licensing now covers over 800 occupations.[30] Once limited to minimum educational requirements and entry exams, board restrictions are now a vast, complex web of anticompetitive rules and regulations. The explosion of licensing and the tangle of restrictions it has created should worry anyone who believes that fair competition is essential to economic health.

A. The Scope of Professional Licensing: Big and Getting Bigger

State-level occupational licensing is certainly on the march. In fact, it has eclipsed unionization as the dominant organizing force of the American labor market. While at their peak, unions claimed 30% of the country's working population, that figure has shrunk to below 15%.[31] Over the same period of time, the number of workers subject to state-level licensing requirements has doubled; today 29% of the American workforce is licensed and 6% certified by government.[32] Conservative estimates suggest that licensing raises consumer prices

---

Unlike the authority to purchase hospitals, the state-granted ability to restrict professional entry and practice will almost always have an anticompetitive effect in the sense that it limits the entry of competitors. Thus, we don't see *Phoeby Putney* as directly widening the path for challenges to licensing board immunity; the battleground, in the case of occupational boards, remains *Midcal*'s supervision prong. Still, the decision is in the spirit of narrowing state action immunity and it reiterates the principle several times that state action immunity is disfavored; so in that sense it accords with our thesis.

[30] KLEINER, *supra* note 3, at 5.

[31] Kleiner, *supra* note 2, at 190.

[32] Kleiner & Krueger, *supra* note 18.

by 15%.[33] There is also evidence that professional licensing increases the wealth gap; it tends to raise the wages of those already in high-income occupations[34] while harming low-income consumers who cannot afford the inflated prices.

The expansion of occupational licensing has at least two causes. First, as the U.S. economy shifted away from manufacturing and towards service, the number of workers in licensed professions swelled, accounting for a greater proportion of the workforce. Second, the number of licensed professions has increased. Where once licensing was reserved for lawyers, doctors, and other "learned professionals," now floral designers,[35] fortune-tellers, and taxidermists[36] are among the jobs that, at least in some states, require licensing. Although ubiquitous, the extent of professional licensing differs dramatically between states. For example, Massachusetts licenses almost three times as many occupations as Rhode Island.[37]

This dramatic shift has put roughly a third of American workers under a regime of self-regulation, since boards are typically dominated by active members of the very profession they are tasked with regulating. Our study of the composition and powers of all occupational licensing boards in Florida and Tennessee revealed that 90% of boards in Florida and 93% of boards in Tennessee are comprised by a majority of license-holders active in the profession.[38] Our empirical findings which we report in Appendix A corroborate the anecdotal references to "practitioner dominance" in the legal and economic scholarship on occupational boards..[39] Unsurprisingly given this composition, boards often succumb to the temptation of self-dealing, creating regulations that insulate incumbent professionals from competition rather than ensure public welfare.

B. The Anticompetitive Potential of Occupational Licensing

This section will illustrate the anticompetitive potential of licensing regulations as well as showing the breadth of occupations subject to licensing. A

---

[33] *Id.* ("[L]icensing's influence on wages with standard labor market controls show a range from 10 to 15 percent for higher wages associated with occupational licensing.").

[34] Kleiner, *supra* note 2, at 194-96; *see* Timothy Muzondo & Bohimer Parderka, *Occupational Licensing and Professional Incomes in Canada*, 13 CAN. J. ECON. 659 (1980); Robert J. Thornton & Andrew W. Weintraub, *Licensing in the Barbering Profession*, 32 INDUS. & LAB. REL. REV. ECON. 242 (1979)..

[35] *See* Meadows v. Odom, 360 F.Supp.2d 811, 813 (M.D.La 2005).

[36] LICENSE TO WORK, *supra* note 10, at 10.

[37] Kleiner, *supra* note 2, at 199; *See* Charles Wheelan, Politics or Public Interest? An Empirical Examination of Occupational Licensure (1999) (unpublished manuscript, University of Chicago).

[38] For a table reporting our findings with respect to the composition and rulemaking authority of boards in Florida and Tennessee, please see Appendix.

[39] *See, e.g.*, Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 28, 45 (2010); Kleiner, *supra* note 2 at 191; Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State*, 31 J. HEALTH POL. POL'Y & L. 587, 596. *See also* COX & FOSTER, *supra* note 16, at 36--38; Jared Ben Bobrow, *Antitrust Immunity for State Agencies: A Proposed Standard*, 85 COLUM. L. REV. 1484, 1496 (1985); *Note, Due Process Limitations on Occupational Licensing*, 59 Va. L. REV. 1097, 1118 (1973) ("[S]eventy-five percent of all occupational licensing boards are made up exclusively of practitioners licensed in the respective occupations.").

complete picture of state licensing activity is impossible—there are thousands of professional boards operating in the United States—but a few snapshots will suffice to show that the theoretical problems of self-regulation are all too real in practice.

1. The New "Professions"

Jobs once thought to be low-skill and low-stakes are increasingly coming under state regulation; a few examples will help illustrate the phenomenon.

In Louisiana, all flower arranging must be supervised by a licensed florist.[40] So when flower shop owner Monique Chauvin's only licensed employee passed away, she found her business in violation of state law.[41] Despite the fact that Chauvin ran her New Orleans shop successfully for over ten years and her arrangements were frequently featured in magazines, she could have been subject to fines and even imprisonment if she continued in operation. The florist board uses money collected from the licensing scheme to fund enforcement actions against unlicensed practitioners, rather than using its authority to pursue complaints or alleged violations of their quality and safety requirements.[42] Constitutional challenges against Louisiana's licensing scheme have proved unsuccessful. A federal court recently upheld the scheme, evidently persuaded by an expert who claimed that licensing "prevents the public from having any injury" from exposed picks, broken wires, or infected flowers.[43] But the court also noted that *even without* a public health justification, the regulation could stand, holding that "industry protectionism" is itself a legitimate state interest.[44]

Minnesota, along with several other states,[45] now define the filing of horse teeth as the practice of veterinary medicine, a move that has redefined an old vocation as a regulated profession subject to restricted entry and practice rules. This put Chris Johnson, a "teeth-floater" for hire, out of work. Although for generations his family had practiced this routine, non-invasive and painless

---

[40] La. Rev. Stat. Ann. § 3:3808 (2010) ("A retail florist's license authorizes the holder thereof to arrange or supervise the arrangement of floral designs which include living or freshly cut plant materials and to sell at retail floral designs, cut flowers, and ornamental plants in pots normally and customarily sold by florists.").

[41] Institute for Justice, *Freeing Louisiana Florists: Licensing Law is Blooming Nonsense, available at* http://www.ij.org/freeing-louisiana-florists-licensing-law-is-blooming-nonsense.

[42] The Louisiana Horticulture Commission, the body that governs licensure for landscape architects and horticulturists, irrigation contractors, arborists, and florists, held fourteen meeting between March 2008 and December 2011, in which they considered 64 cases. In 62, the alleged infraction was practicing without a license. In only two cases did the Commission address violations of substantive rules governing the practice of horticulture. For board meeting minutes, visit https://wwwprd.doa.louisiana.gov/boardsandcommissions/viewMeetingMinutes.cfm?board=475.

[43] *Meadows*, 360 F.Supp.2d, at 824.

[44] *Id.* at 824--25.

[45] *See* American Veterinary Medicine Association, *State Summary Report* (updated January, 2013), *available at* https://www.avma.org/Advocacy/StateAndLocal/Pages/sr-dental-procedures.aspx

procedure[46] for satisfied customers, the Minnesota veterinary board sent Chris a cease-and-desist letter. Since his business did not employ veterinarians to supervise the floating, continued operation would be considered an unlicensed practice of veterinary medicine, carrying severe penalties in Minnesota. Chris lost a constitutional challenge against the rule.[47]

Several states prohibit the sale of caskets by anyone other than licensed funeral directors.[48] This restriction outlawed businesses like the Benedictine monks' woodshop at Saint Joseph Abbey in Louisiana. For years, the monks made simple pine coffins to bury their departed. But when they opened their shop to the public to help cover the costs of healthcare for the monks, the State Board of Embalmers and Funeral Directors, a body with only two members from outside the industry, found the competition unwelcome. It served the monks with a cease and desist letter, threatening jail time and a fine. The monks never handled bodies or planned services; they drop-shipped the empty caskets to mortuaries, offering an inexpensive and simple alternative to the extravagant caskets typically sold at funeral homes. And although Louisiana restricts the *sale* of caskets, it does not regulate the design of caskets or even require that bodies be buried in a casket at all.[49]

For a final set of examples, we turn to the beauty industry. State cosmetology boards have responded to competition from two increasingly popular practices, African-style hair braiding and eyebrow threading, with demands that braiders and threaders obtain cosmetology licenses before lawfully practicing their craft.[50] Neither practice requires sharp instruments or chemicals, and neither involves a significant risk of infection. Now, many state cosmetology boards want braiders and threaders to attend two years of school—with a price tag of $16,000—to learn procedures and techniques irrelevant to their practice, pass an exam and pay yearly dues to maintain a license in cosmetology, a profession they have no interest in practicing.[51]

For Texas entrepreneur Ashish Patel, this has meant shuttering his successful brow threading business and firing his employees, after the state upheld the licensing requirements against his constitutional challenge.[52] For hair braider Amber Starks, it means crossing the boarder daily from her native Oregon, where

---

[46] A domesticated horse's modern diet is not coarse enough to naturally wear down its teeth, which never stop growing, and so periodically horse teeth require filing, or "floating." *See* Institute for Justice, *Challenging Barriers To Economic Opportunity: Challenging Minnesota's Occupational Licensing Of Horse Teeth Floaters, available at* http://www.ij.org/minnesota-horse-teeth-floating-background#_ftn1.

[47] Johnson v. Minnesota Board of Veterinary Medicine, No. 27-CV-06-16914 (Minn. Dist. Ct. 4th Judicial Cir.).

[48] See LA.REV.STAT. §§ 37:831(37)-(39).

[49] After several years of litigation, the monks finally won a constitutional challenge against the restriction. *See* St. Joseph Abbey v. Castille, 700 F.3d 154 (5th Cir. 2012).

[50] Goldstein, *supra* note 19, at 20.

[51] *Id.*

[52] *See* India West, *Threading Licensing in Texas Tied Up in Debate, Lawsuit* (March 28, 2012) *available at* http://indiawest.com/news/3739-Threading-Licensing-in-Texas-Tied-Up-in-Debate--Lawsuit.html.

hair braiders are explicitly required to have a cosmetology license, to Washington, where they are not.[53] The majority of her clientele come from Oregon as well, but, like her, they must make the trip over the border to get their preferred hair style at a price they can afford.[54] For the millions of customers living far away from the eleven states that exempt hair braiders from the cosmetology license requirements,[55] they must either find a practitioner willing to flout the board or pay cartel prices.

2. Old Professions, New Restrictions

For some professions, licensing provides such an obvious public benefit that barriers to entry and regulation of practice are accepted as necessary evils. But while some restrictions are necessary to ensure quality and public safety, a close examination of restrictions on these professions suggests that these boards, too, have abused their ability to self-regulate.

For example, in many states, dental licensing boards restrict the number of hygienists a dentist can hire to two.[56] The anticompetitive effects of this restriction are well-known; in 1987 the FTC published a policy paper showing that dentists-to-hygienists ratios raise prices but not quality.[57] According to the American Dental Association, the ratio restrictions are necessary to prevent "hygiene mills," practices offering low-cost dental cleanings without advanced dental services like exams, diagnosis, and surgery. The ADA calls such practices unsafe, but since dental hygienists must themselves possess a license requiring extensive education on safe cleaning techniques, it seems clear that the main threat these "mills" pose is to dentists themselves, in the form of reduced demand for their services.

At least one state took the hygienist restrictions further. The South Carolina Board of Dentistry required that exams performed by a licensed dentist must accompany all cleanings.[58] The rule ended a program to extend in-school dental cleanings to rural and other underserved children. When the FTC brought suit against the Board, the political pressure led the South Carolina legislature to pass a bill eliminating the requirement.

---

[53] The Oregonian, *Braiding African American hair at center of overregulation battle in Oregon* (August 11, 2012), *available at* http://www.oregonlive.com/politics/index.ssf/2012/08/braiding_african_american_hair.html.

[54] *Id.*

[55] For a breakdown of hair-braiding licensing by state, visit http://media.oregonlive.com/pacific-northwest-news/photo/gs11braid12-03jpg-cb31f441f0a667ab.jpg .

[56] J. NELLIE LIANG AND JONATHAN D. OGUR, RESTRICTIONS ON DENTAL AUXILIARIES 6 (1987).

[57] *Id.* From these data, the authors estimate the deadweight loss that results from the restrictions to be $680-710 million in 1982 dollars. Relatedly, Kleiner and Kudrle showed empirically that, at least for uninsured individuals, stricter licensing restrictions for dentists has only very little impact on quality. *See* Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & ECON. 547 (2000).

[58] In re South Carolina Board of Dentistry, 138 F.T.C. 229 (2004).

Similarly, the advent of nurse practitioners and physician's assistants has ignited a turf war between these "physician extenders"[59] and doctors. Nurse practitioners and physicians assistants are trained in some of the same skills as family practice physicians, but need not learn the more advanced skills essential to a medical degree. Thus, a nurse practitioner's education is cheaper than that of a medical doctor, and their fees can reflect that cost savings. For many procedures, outcome studies reveal that the extender is as safe and effective as the physician. Extenders have been essential to low-cost convenience clinics like CVS's MinuteClinics or public health initiatives aimed at serving low-income individuals with restricted access to medical care.

Undoubtedly influenced by powerful lobbying from the AMA, twelve states, including such populous states as California, Texas, and Florida require physician supervision over all nurse practitioner activity.[60] Several states outlaw prescribing by nurse practitioners.[61] For the most part, the reins of competition are held by state medical boards made up primarily by physicians, who decide the level of supervision required.

Lawyers, too, use licensing to limit competition. Restrictions on bar entry and rules defining the ethical conduct of lawyers reveal that attorney licensing bodies have yielded to the temptation of self-dealing. Advertising restrictions insulate lawyers from competition from lawyers who can claim better average outcomes for clients. For example, Alabama requires all attorney advertising to include a disclaimer: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."[62] Many states define title certification and abstraction as the "practice of law," in effect inflating demand for legal services by requiring attorney representation at all real estate transactions.[63] And the state ethical rules against "champerty," or selling an interest in the outcome of a lawsuit, helps contingency fee lawyers prop up the price of representation at 30% of the award.[64]

---

[59] For a definition of "physician extender," see http://medical-dictionary.thefreedictionary.com/physician+extender.

[60] *See* American Association of Nurse Practitioners, *2013 Nurse Practitioner State Practice Environment, available at* http://www.aanp.org/legislation-regulation/state-practice-environment.

[61] *Id.*

[62] Alabama Rules of Professional Conduct Rule 7.2, *available at* http://www.sunethics.com/al_7_2.htm.

[63] The FTC has written letters to states and their bar associations considering restrictions on who may participate in loan closings, urging them to avoid "the anticompetitive consequences of rules that prevent nonlawyers from conducting closings." F.T.C. OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE [STATE ACTION TASK FORCE] 68 (2003).

[64] Max Schanzenbach & David Dana, *How Would Third Party Financing Change the Face of American Tort Litigation? The Role of Agency Costs in the Attorney-Client Relationship* (Sept. 14, 2009), *available at* http:// www.law.northwestern.edu/searlecenter/papers/Schanzenbach_Agency%20Costs.pdf. Professors Dana and Schanzenbach explore the efficiencies of allowing third-party assignment highlighting the anticompetitive effect of a rule allowing assignment only to attorneys. They point out that "the emergence of a full assignment market would undermine the ability of contingency fee firm lawyers to charge as much as they do," since allowing champerty would create a competitive market for legal claims that would likely reduce fees to below the traditional (and suspiciously stable) 30% that

Each state has its own bar exam and licensing procedure, reducing lawyer mobility across state lines. Segmentation of the market means that lawyers in each state are insulated from out-of-state competition, allowing for higher legal fees than would obtain in a nation-wide market. The justification for this is colorable—that state law differs between the states and so a different exam is essential for each jurisdiction—but it fails to account for practices like California's requirement that lawyers qualified in other states must retake the multi-state portion of the exam when sitting for the California bar.[65]

Licensing bodies have also devised ways to restrict competition between law schools and among law professors. In 1995 the DOJ challenged the ABA's law school accreditation standards that required schools to pay faculty "compensation... comparable with that of other ABA-approved schools," limited teaching obligations to eight hours per week, and required schools to provide professors with paid leaves of absence.[66] Although the ABA entered a consent degree that eliminated some of the most anti-competitive rules, they were replaced with standards that allow the ABA to achieve the same anticompetitive effects.[67] In the same vein, the ABA refused to accredit Massachusetts School of Law at Andover for allegedly pretextual reasons. MSLA sued the ABA accusing it of enforcing a group boycott and conspiring to monopolize legal education in violation of the Sherman Act.[68] It lost on state action grounds.[69]

Another device that many professions now use to restriction competition is the apprenticeship. Many state licensing boards require apprenticeships for would-be professionals, essentially guaranteeing incumbents low-cost labor[70] while raising barriers to entry. For example, most states' funeral and mortuary licensing boards require an applicant to complete a one-year apprenticeship under a licensed funeral director on top of educational and testing requirements.[71] Similarly, some states require lengthy apprenticeships for aspiring psychotherapists. California requires a total of 3,000 hours of therapy provided under the supervision of a licensed

---

contingency lawyers currently charge. This pay cut, argue Dana and Schanzenbach, partially explains why legislation allowing champerty lacks attorney support.

[65] Fourteen other states also require retaking the MBE. *See* http://harreciprocity.com/bar-exam-mbe-transfer/.

[66] United States v. American Bar Association, 934 F. Supp. 435 (D.D.C. 1996). For the DOJ's competitive impact statement, visit http://www.justice.gov/atr/cases/f1000/1034.htm.

[67] *Id.* For example, where the 1995 standards limited teaching load to eight hours per week, the modern standards emphasize that professors should have enough time, in addition to teaching, for research and scholarship, "keeping abreast of developments in their specialties," and performing obligations to the law school, university community, profession, and the public. Thus the ABA can make a compelling argument that any school requiring more than eight hours per week of teaching violates this provision. For a list of contemporary restrictions, visit http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_chapter4.authcheckdam.pdf.

[68] Massachusetts School of Law at Andover v. ABA, 107 F.3d 1026 (3d Cir. 1997).

[69] *Id.* at 1038.

[70] Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 410 (1993-94).

[71] For a state-by-state breakdown, see http://www.nfda.org/licensing-boards-and-requirements.html.

therapist at that therapist's place of work.[72] Interns cannot receive compensation directly from patients, but rather can only be paid (if they get paid at all) by their employers.[73] And the statute actually *limits* supervision to five hours a week, restraining competition among therapists for interns.[74]

II. THE ROAD TO PROFESSIONAL CARTELIZATION

State professional boards arose from a belief that for some professions, inexpert practice would be socially inefficient or even dangerous. Licensing created a mechanism by which the government could prevent incompetent practitioners from participating in the market. Licensing was justified by the idea that the public benefits of regulation outweighed its costs in the form of higher prices and reduced economic liberty.[75] But unlike other regulatory bodies, licensing boards became dominantly comprised of practitioners themselves,[76] on the theory that only members of a profession had the expertise necessary to define efficient rules for entry and practice. With the regulated acting as regulators, self-dealing was inevitable. Thus the board-as-cartel was born.

This Part tells the economic and legal stories of anticompetitive licensing in the United States. Section A reviews the economic theory behind licensing, identifying its potential costs and benefits. It explains that licensing schemes that raise consumer prices and that yield little benefit to anyone but incumbent practitioners are socially wasteful. But, as detailed in Section B, state licensing boards have virtually free rein to enact such socially wasteful regulation.

A. The Economics of Licensing

Licensing has long been an obsession of economists, including Milton Friedman who dedicated an entire chapter to the topic in his 1962 book CAPITALISM AND FREEDOM.[77] But the past twenty years has witnessed an explosion of empirical work on the effects of licensing restrictions on service quality and price, led most prominently by Morris Kleiner at the University of Minnesota. Kleiner's work and that of his contemporaries reveal a consensus in the

---

[72] Business and Professional Code of California, §4980.43, *available at* http://www.bbs.ca.gov/pdf/publications/lawsregs.pdf.

[73] *Id.*

[74] *Id.*

[75] KLEINER, *supra* note 3, at 44-48; *see* Lee Benham, *The Demand for Occupational Licensure, in* OCCUPATIONAL LICENSURE AND REGULATION 13, 17 (Simon Rottenberg ed., 1980); Wheelan, supra note 37.

[76] *See supra*, TAN 38&39 and Appendix A. *See also* COX & FOSTER, *supra* note 16, at 36--38; Kleiner, *supra* note 2, at 191 ("Generally, members of the occupation dominate the licensing boards.").

[77] MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962). *See also* ADAM SMITH, THE WEALTH OF NATIONS, Book I, Chapter 10, Part II (1776), *cited in* KLEINER, supra, note 3, at 3 (observing that guilds raise earnings by limiting apprenticeships and lengthening their duration).

academy: a licensing restriction can only be justified where it leads to better quality professional services, and for many restrictions, proof of that enhanced quality is lacking.[78]

1. The Costs of Licensing: Higher Prices, Lower Quantity

Licensing restrictions can effect price along four dimensions. First, professional licensing can act as a barrier to entry into the profession.[79] Second, licensing can establish rules of practice, like advertising bans, that restrict competition.[80] Third, state boards can suppress interstate competition by recognizing licenses only from their own state. Finally, a profession can prevent competition by broadening the definition of its practice, bringing more potential competitors under its licensing scheme.[81] These "scope-of-practice" limitations tend to oust low-cost competitors that operate at the fringes of an established profession.

To begin, it is worth pointing out what is different about a professional licensing cartel from a typical cartel. A typical price-fixing cartel will only be effective if an industry has a small number of firms in the industry; otherwise the temptation to cut price and expand output will be too great. Licensing boards can effectively raise price, however, despite allowing thousands of market participants. Sometimes they work by muting price competition among members through direct restrictions on professional practice, but that is not the only way to be effective. Limiting the number of licensed professionals by making entry difficult, and unauthorized entry illegal, raises price because it limits supply, and it does so even if licensed participants compete vigorously. Unlike firms which may be able to expand without bound, a licensed professional can only provide so much service

---

[78] *See* KLEINER, *supra* note 3, at 8 ("The major public policy justification for occupational licensing lies in its role in improving quality of service rendered .... [T]he effect of regulation on the level of service quality is uncertain."); Morris M. Kleiner & Charles Wheelan, *Occupational Licensing Matters: Wages, Quality, and Social Costs*, 8 CESIFO DICE REPORT, Autumn 2010, at 29, 29 ("Of course, these labor market distortion must be weighed against any potential gains to consumers from the quality improvements in the licensed profession. Yet even the putative benefits of licensure have come under academic assault."); MORRIS M. KLEINER & HWIKWON HAM, REGULATING OCCUPATIONS: DOES OCCUPATIONAL LICENSING INCREASE EARNINGS AND REDUCE EMPLOYMENT GROWTH? 5 (2005) ("The evidence from empirical literature suggests that the quality impacts are unclear..."); Morris M. Kleiner, *Enhancing Quality or Restricting Competition: The Case of Licensing Public School Teachers*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 1, 3, 8 (2010) ("The general rationale for licensing is the health and safety of consumers. Beyond that, the quality of service delivery... [is] sometimes invoked."); REBECCA LEBUHN & DAVID A. SWANKIN, CITIZEN ADVOCACY CTR., REFORMING SCOPES OF PRACTICE 3 (2010) ("The stated purpose [of state licensing laws] is to ensure consumers that healthcare workers conduct their practices in areas for which they are properly trained."); Sidney L. Carroll and Robert J. Gaston, *Occupational Licensing and the Quality of Service*, 7 LAW & HUMAN BEHAVIOR 139, 145 (1983).

[79] Kleiner, *supra* note 2, at, 192; *see* Simon Rottenberg, *Introduction, in* OCCUPATIONAL LICENSURE AND REGULATION 1, 1-10 (Simon Rottenberg ed., 1980).

[80] John E. Kwoka, *Advertising and the Price and Quality of Optometric Services*, 74 AM. ECON. REV. 211, 216 (1984).

[81] *See* Kleiner & Krueger, *supra* note 7, at 5 ("For example, the work of 'hair braiders', which is unlicensed, could be brought under the control of the cosmetology board and limited to only licensed cosmetologists or barbers.").

herself. Boards can further limit supply by controlling what can be produced by unlicensed workers supervised by a licensed worker; the rule requiring that dentists supervise a maximum of two hygienists is an example. As a result licensing boards can limit output and raise price even with thousands of competing professionals much as cartelized oligopolies can in other industries.

Economists have studied extensively the effects of these professional licensing requirements on price and, less extensively, quantity. Where the studies have the statistical power to determine an effect, they tend to show an increase in price and reduction in quantity.[82] Mandatory entry requirements—such as examinations or educational prerequisites—tend to raise consumer prices, although estimating the effect with any certainty has proved difficult.[83] One 2005 study examining wage differences between similarly educated professionals estimates that licensing requirements raise wages 10 to 12 percent.[84] Newer data suggest that licensing raises wages by 18%.[85] A 2000 study showed that tougher licensing, in the form of lower pass rates on the qualifying exam, increased prices 11 percent for dental services.[86]

Similarly, most studies examining practice restrictions show that the more heavy-handed a licensing board is in dictating hours, advertising, or levels of supervision within a profession, the higher the consumer prices. For example, one team of researchers estimated that restricting the number of hygienists a dentist may employ increased the cost of a dental visit by 7%, resulting in an estimated $700 million cost (in 1987 dollars) to consumers per year.[87] Restrictions on advertising by lawyers is associated with a 5-11 percent increase in price,[88] and in optometry, restrictions on advertising have been shown to increase price by 20 percent.[89] Geographic restrictions like non-reciprocity between states also tend to increase consumer prices.[90]

---

[82] *See* KLEINER, *supra* note 3, at 8-12. Since licensing the professions is mostly the prerogative of individual states, economists have used the U.S. as a kind of natural experiment to observe price differences under different licensing regimes. Studies of licensing's price effects typically adopt one or more of three basic methodologies. First, studies can compare prices in professions before and after states' imposition of licensing requirements. Second, studies can compare prices of professional services in a state that requires a license with prices in a state that does not (interstate study). Finally, economists have compared wages (as a proxy for price) between licensed professions and unlicensed professions that require similar education levels and similar day-to-day responsibilities and lifestyle. *See generally* Kleiner & Kudrle, *supra* note 57, at 549; Kwoka, *supra* note 80, at 216.

[83] Kleiner, *supra* note 2, at 197.

[84] KLEINER & HAM, *supra* note 78, at 5.

[85] Kleiner & Krueger, *supra* note 7.

[86] Kleiner & Kudrle, *supra* note 57, at 573.

[87] LIANG & OGUR, *supra* note 56, at 43.

[88] Kwoka, *supra* note 80, at 216.

[89] *See* FEDERAL TRADE COMMISSION, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING (1984).

[90] For example, a 1978 study found a 12 to 15 percent premium on dental services in states that did not allow dentists licensed in another state to practice. Another study estimated that universal reciprocity between states for dentists would result in a geographical reallocation of dentists worth $56 million (1978 dollars) in consumer surplus. Bryan L. Boulier, *An Empirical Examination of the Influence of*

Because the nature of licensed practice is not to produce physical goods that can be counted, measuring output as a function of licensing restrictions has been a less attractive method for economists to measure licensure's effect on competition. Several studies, however, have analyzed licensing's effect on a related issue: employment growth. Here, the results have been more mixed than in the price context. One 1981 study examining electricians, dentists, plumbers, real estate agents, optometrists, sanitarians, and veterinarians found that licensing reduces the number of practitioners in a given field.[91] But other studies have failed to measure an effect of licensing on the supply of barbers[92] and nurses.[93]

If licensing increases consumer prices, then some consumers must go without professional services, as compared to a world without licensing restrictions on a profession. These are the consumers who could afford the service at the price that would obtain without licensing.[94] Some would-be practitioners lose out as well; these are the individuals that do not have licenses but would like to compete with the licensed professionals by offering low-cost services.[95] A state's ability to cite and even prosecute unlicensed practitioners deters these low-cost transactions from occurring. In antitrust terms, these deterred low-cost transactions make up the deadweight social welfare loss from licensing.[96]

The story, however, might not be so simple. To get a complete picture of the world but-for licensing, one needs a theory of how efficiently an unrestricted market would function.[97] Advocates of licensing argue that for professional services, the free market does a poor job of efficiently allocating service to consumers because without licensing, service quality would be too low. The notion that a free market would result in too-low quality service rests on two possible sources of failure in the market for professional services.[98] First, absent licensing, the asymmetry of information between professional providers and consumers about

---

Licensure and Licensure Reform on the Geographical Distribution of Dentists, *in* OCCUPATIONAL LICENSURE AND REGULATION 73, 95 (Simon Rottenberg ed., 1980).

[91] Carroll & Gaston, *supra* note 78, at 142.

[92] Thornton & Weintraub, *supra* note 34, at 249..

[93] *See* William D. White, *Mandatory Licensure of Registered Nurses: Introduction and Impact*, *in* OCCUPATIONAL LICENSURE AND REGULATION 47, 70--71 (Simon Rottenberg ed., 1980).

[94] *See* Tom Rademacher, *Don't Try This at Home: Man Does Own Root Canals*, Ann Arbor News, Feb. 9, 1997, at A11, *cited in* KLEINER, *supra* note 3, at 43 (relating a news story about a fruit farmer who performed his own root canals on himself because he was unable to afford dental services).

[95] *See* Kleiner, *supra* note 2, at 192--93.

[96] *See* Kleiner, *supra* note 78, at 4. *See also* Kleiner & Wheelan, *supra* note 78, at 29, 31 (noting that "[w]hen members of the legal professional told Milton Friedman that every lawyer should be a Cadillac, he famously replied that many people would be better off with a Chevy.").

[97] *See* KLEINER & HAM, *supra* note 78, at 7 ("The focus of the analysis is to examin the counterfactual of what would be the impact on the earnings of individuals in an occupation if that occupation ceased to be regulated"); Kleiner & Wheelan, *supra* note 78, at 29, 30 (comparing certification regime with licensure regime).

[98] Benham, *supra* note 75 ("Almost all licensed occupations have claimed they will successfully cope with undesirable market failures.").

the quality of service[99] would create what economists call the lemons problem. Second, free markets for professional services will result in sub-optimal levels of quality because the market participants (provider and consumer) do not internalize all the costs of bad service. In other words, a free market for professional services creates negative externalities.

The lemons problem, first articulated by George Akerlof in 1970, occurs in a market where products vary in quality but the consumers cannot reliably distinguish good products from bad.[100] If consumers cannot distinguish good professional service from bad, then the high quality, high price providers will be unable to attract even those customers who want and can pay for better quality service.[101] Unable to obtain a premium for their higher quality service, they will either exit the market or reduce the quality of the service to match their low-quality, low-cost competitors. This leads to deadweight loss in the form of deterred transactions between high-quality providers and high-demand consumers. Licensure addresses the information asymmetry at the root of the lemons problem by assuring consumers that all providers meet a minimum quality standard.

The second market failure possibly addressed by licensure occurs when low-price, low-quality transactions impose costs on third parties. An individual may be willing to receive poor service for a low price, rather than no service at all, but only because the costs of bad service (treatment in a public hospital for infection from a careless barber or a nuisance settlement of a frivolous suit filed by an unscrupulous lawyer) are not visited in their entirety on the consumer of the service. Licensure can improve public safety by imposing quality standards on professionals again through education or examination and by setting rules of professional practice.

So it may not be fair to say that professional licensure results in deadweight loss by harming competition if it also avoids the deadweight loss (associated with the lemons problem and negative externalities) that would obtain in a free market. But the cure must not be worse than the disease: a pro-competitive licensing scheme should avoid more deadweight loss than it creates. Directly quantifying the social harm from licensure on the one hand, and from free-but-inefficient markets for professional services on the other is difficult. But if licensing has *any* effect against the market failures it is designed to address, then it should improve service quality. Put simply, if licensure works, quality of service will improve.[102]

---

[99] Alex R. Maurizi, *The Impact of Regulation on Quality: The Case of California Contractors*, *in* OCCUPATIONAL LICENSURE AND REGULATION 26, 26 (Simon Rottenberg ed., 1980).

[100] George A. Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q.J. Econ. 488 (1970).

[101] *See* COX & FOSTER, *supra* note 16, at 5--6.

[102] Kleiner, *supra* note 2, at, 191--92.

2. The Benefits of Licensing: Improved Quality?

The economic research on quality of service as a function of licensing paints a murky picture. Some studies show modest increases in quality,[103] at least for some kinds of consumers, but some are unable to show any effect of licensing on quality.[104] A few studies even claim to show that licensing reduces quality.[105] Part of the explanation for the mixed results may be the difficulty of assessing the quality of professional services;[106] indeed this is the very source of the lemons problem licensing is partly designed to address. In the last few decades, researchers have used a variety of ingenious methods for evaluating quality of professional services, but none is without its flaws.

Alex Maurizi used the number of consumer complaints lodged with the California Contractors' State License Board as a proxy for quality of service from professional contractors.[107] He hypothesized that if barriers to entry (here a licensing examination) were effective in eliminating low-quality providers, then stricter (lower) pass rates should be associated with higher quality service.[108] In fact he found the opposite.[109] Similarly, economists have used malpractice litigation rates to measure quality of professional outcomes.[110] Using consumer dissatisfaction to gauge quality has obvious limits, since consumers may not take the initiative to formalize their unhappy experience in a complaint or a lawsuit.[111]

Sometimes quality can be measured directly by looking at actual outcomes from professional service. For example, Kleiner used test scores[112] to measure the effect of licensing requirements for public school teachers on student performance. His study did not show an effect from licensing.[113] Using a similar outcome-based

---

[103] *See* KLEINER, *supra* note 3, at 53 tbl.3.2; *see also* Carroll & Gaston, *supra* note 78, at 145 (concluding that licensing results in better delivered quality but not better quality received by society as a whole); Kleiner & Kudrle, *supra* note 57, at 575 (suggesting that licensing increased the quality of dental visits but not overall dental health); Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 REV. ECON. STUD. 843, 856 (1986) (finding that consumers who value quality relatively little are worse off with licensing).

[104] *See* KLEINER, *supra* note 3, at 53 tbl.3.2 (2006); *see also* Morris M. Kleiner & Daniel L. Petree, *Unionism and Licensing of Public School Teachers: Impact on Wages and Educational Output*, *in* WHEN PUBLIC SECTOR WORKERS UNIONIZE 305, 317 (Richard B. Freeman & Casey Ichniowski eds., 1988); Joshua D. Angrist & Jonathan Guryan, *Teacher Testing, Teacher Education, and Teacher Characteristics*, 94 AM. ECON. REV. 241, 246 (2004); Thomas Kane, et al., *What Does Certification Tell us About Teacher Effectiveness? Evidence from New York City*, 27 ECON. EDUC. REV. 615, 629 (2007); Robert Gordon et al., *Identifying Effective Teachers Using Performance on the Job* 28 (The Hampton Project, Discussion Paper No. 2006-01, 2006).

[105] *See* KLEINER, *supra* note 3, at 53 tbl.3.2; *see also* Carroll & Gaston, *supra* note 78, at 145; Maurizi, *supra* note 99, at 34-35.

[106] *See* Kleiner, *supra* note 2, at, 198.

[107] Maurizi, *supra* note 99, at 27-29.

[108] *Id.* at 32 tbl.2.

[109] *Id. at* 31--32.

[110] KLEINER, *supra* note 3, at 57.

[111] Maurizi, *supra* note 99, at 27-28; *see also* KLEINER, *supra* note 3, at 56 ("[L]icensing makes an occupation more visible and sets up rules and regulations that make law suits easier to file.").

[112] *See* Kleiner, *supra* note 78, at 7-8; *see also* KLEINER, *supra* note 3, at 54 (calling test scores "a generally recognized measure of 'quality' in education.").

[113] *See* Kleiner, *supra* note 78, at 7-8; *see also* Thomas Kane, et al., *What Does Certification Tell us About Teacher Effectiveness? Evidence from New York City*, 27 ECON. EDUC. REV. 615, 629 (2007).

technique, Kleiner and Kudrle (2000) used dental exam results from new enlistees into the U.S. Air Force. Kleiner and Kudrle found that for uninsured individuals, the strictness of licensing in their home state had no impact on the health of their teeth at the time of entering the Air Force.[114]

B. The Legal Landscape of Professional Licensing

Where researchers have been able to show that licensing improves quality, regulation may be reducing market failures caused by information asymmetry and negative externalities. If so, and if licensing's benefits outweigh its harm to competition, then it is socially desirable. But under the dominant interpretation of antitrust immunity, state licensing boards never have to balance the pro-competitive benefits of a restriction against its anticompetitive effects. All other combinations of competitors operate in Sherman's shadow, where their agreements must improve economic efficiency to escape condemnation. Licensing boards, in contrast, have mostly been treated as exempt from antitrust suits, allowing them to create rules that maximize welfare for incumbent professionals at the expense of everyone else. That leaves only constitutional avenues of redress, which have proved to be weak against self-dealing boards.

1. Barriers To Entry: Twin Immunities Shield State Licensing Boards From Antitrust Liability

Licensing requirements are essentially agreements, usually among competitors, to create barriers to entry into their profession. The practitioners reap the rewards of weaker competition in the form of higher prices and higher profits. This conduct sounds, on its face, like a perfect target for Sherman Act §1 liability. But with *Parker v. Brown*[115] and *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*,[116] the Supreme Court has created twin immunities that make antitrust suits over state licensure regulation very difficult.

Parker created antitrust immunity for "state action," which shields state governments and bodies delegated a state's authority from federal antitrust liability. In the line of cases flowing from *Parker*, the Court defined the contours of the immunity to include all bodies "clearly authorized" by the state to restrict competition. In most cases, these bodies must also be subject to "active

---

[114] However, for those with insurance coverage (which was also associated with higher income) tougher state regulations on dentistry improved their average dental health. *See* Kleiner & Kudrle, *supra* note 57, at 575-76. The results of the Air Force study exemplify an interesting finding of some studies of quality: that positive quality effects, where found, tend to be limited to higher-end consumers. See *also* Carroll & Gaston, *supra* note 78, at 145 (examining a variety of professions from plumbers to dentists, showing that licensing improved the quality of practitioners but decreased the overall quality received by consumers by creating a shortage of them).

[115] 317 U.S. 341 (1943).

[116] 365 U.S. 127 (1961).

supervision" by the state itself.[117] State action immunity bars suits by aggrieved competitors and public enforcers alike. In *Noerr*, the Court held that private people and organizations cannot be sued under the Sherman Act for attempting to influence government action—by either filing a law suit or lobbying a legislature—even if their intent and effect is anticompetitive.[118] Together, these doctrines "are complementary expressions of the principle that the antitrust laws regulate business, not politics."[119]

a. *Parker* and State Action Immunity

In *Parker*, the Supreme Court rejected antitrust claims against what was essentially a price-fixing scheme among competitors because it had been blessed by the state of California.[120] In holding that the Sherman Act does not apply to state government action, the Court made essential the identity of the actor—the state or private citizens—but provided no guidance on how to draw the line. This created serious problems for lower courts trying to apply *Parker* since states rarely regulate economic activity directly through an act of legislature. Rather, states delegate rulemaking and rate-setting to agencies, councils or boards dominated by private citizens. Were these non-state, quasi-governmental bodies arms of the state or collections of private actors?

The Court responded in 1982 with *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,*[121] providing a test to distinguish private from state action. To enjoy state action immunity, the Court held, the challenged restraint must be "clearly articulated and affirmatively expressed as state policy" to restrict competition and that the policy must be "actively supervised by the State itself."[122] The *Midcal* rule thus shifted the battleground from the public/private boundary to the meaning of "clear articulation" and "active supervision." In no fewer than ten decisions refining *Midcal's* two-step,[123] the Court has made clear that virtually any colorable claim to state authority will do.[124] In contrast, the supervision

---

[117] California Retail Liquor Dealers Association v. Midcal Aluminum Inc., 445 U.S. 97, 105 (1980).

[118] *Noerr*, 365 U.S. at 136.

[119] City of Columbia v. Omni Advertising, 499 U.S. 365, 499 (1991);

[120] *Parker*, 317 U.S. at 351.

[121] 445 U.S. 97 (1980).

[122] *Id.* at 105.

[123] F.T.C. v. Phoebe Putney Health System, Inc., 2013 WL 598434 (U.S. Feb. 19, 2013); F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621 (1992); *Omni*, 499 U.S. at 383 (1991); Patrick v. Burget, 486 U.S. 94 (1988); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); Fisher v. City of Berkeley, 475 U.S. 260 (1986); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Southern Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984); Community Communications Co., Inc. v. City of Boulder, Colo., 455 U.S. 40 (1982).

[124] "Clear articulation" need not be an affirmative statement about abrogating competition policy. *See* STATE ACTION TASK FORCE, *supra* note 63, at 8 ("To satisfy the 'clear articulation' standard, the case law provides that the state need not compel the anticompetitive conduct at issue."). And if a state creates a policy that has foreseeable anticompetitive effects, that policy can be all the articulation necessary under *Midcal's* first prong. *See Hallie*, 471 U.S. at 45 (1985). Indeed since *Midcal*, the Supreme Court has rejected a "clear articulation" claim only once. In *Community Communications Co. v. City of Boulder*, Boulder argued unsuccessfully that Colorado's "home rule" statute giving Boulder the right to self-govern was a "clearly

requirement can have real bite, but since *Midcal*, the Court has created a category of entities that are not subject to the supervision requirement at all.[125] These entities, which include municipalities,[126] enjoy immunity if they can meet the "clear articulation" prong alone.

b. *Noerr* and Petitioning Immunity

While *Parker* immunity is used to insulate public or quasi-public bodies from antitrust scrutiny, *Noerr* immunity shields private actors petitioning governments for restraints benefiting them at the cost of competition.[127] *Noerr* and *Parker* immunities are, as Justice Scalia has observed, "two faces of the same coin;"[128] by disallowing suits against the private parties influencing state action, *Noerr* essentially closes a loophole left open by *Parker*. *Noerr* itself was a suit against a confederacy of railroad companies accused of persuading a state legislature to pass laws unfavorable to truckers.[129] Even though the railroads had used deception in their campaign to influence the state legislature,[130] the Court found their actions to be immune to antitrust liability on federalism[131] grounds. Later cases extended *Noerr* immunity to government petitioning of all avenues, including lawsuits[132] and executive branch lobbying.[133]

c. Immunity for professional licensing boards under *Parker* and *Noerr*

Although many potential plaintiffs and scholars—and probably licensing board members—assume that state occupational boards operate outside of the Sherman Act's reach,[134] the question may be more open than it appears, especially following the Fourth Circuit's 2013 decision in *North Carolina Board of Dental Examiners v. FTC* which held a state licensing board to account for its

---

articulated and affirmatively expressed state policy" that allowed them to interfere with competition in the local cable market.

[125] STATE ACTION TASK FORCE, *supra* note 63, at 18.

[126] *See Hallie*, 471 U.S. at 45.

[127] *See Omni*, 499 U.S. at 379--80 ("The federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government."); Allied Tube & Conduit Corporation v. Indian Head, Inc., 486 U.S. 492, 499 (1988) ("Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability.").

[128] *Omni*, 499 U.S. at 383.

[129] *Noerr*, 365 U.S. at 129--30.

[130] The defendants deceived the legislature by attributing their own anti-trucking statements and studies to "bogus independent civic groups." Marina Lao, *Reforming the* Noerr-Pennington *Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965, 972 (2003).

[131] *Noerr* at 137 (holding that allowing such liability would "substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade.").

[132] Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 365 (1991).

[133] United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

[134] *See, e.g.*, Neil Katsuyama, *The Economics of Occupational Licensing: Applying Antitrust Economics to Distinguish Between Beneficial and Anticompetitive Professional Licenses*, 19 S. CAL. INTERDISCIPLINARY L. J. 565, 569 (2010) ("Most licensing boards were created or are managed by the state, and therefore are beyond the reach of the Sherman Act."); *cf.* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 693 (1991) (observing that the Supreme Court suggested "that the supervision requirement is probably inapplicable to state agencies, a suggestion with which the lower courts have virtually all agreed.").

anticompetitive restrictions on practice. The law here is complicated and influx; thus a comprehensive treatment of its details are necessary.

Certainly licensing restrictions passed directly by a state's legislature or supreme court enjoy state action immunity as a matter of course.[135] Most licensing regulations, however, become law when promulgated by an unelected administrative board, and the Supreme Court has never determined the status of practitioner-dominated boards under *Midcal*. Boards likely meet *Midcal*'s first prong requiring clear articulation from the state, but their decisions are not typically subject to the kind of state review that courts have required to find "active supervision." Thus, the question turns on whether state licensing boards are among the entities that do not have to show supervision at all.

Any state mandate calling for the regulation of entry and good standing in a profession is likely to meet the Court's low bar for "clear articulation," since all licensing restricts competition by reducing the number of competing professionals in the field.[136] The Ninth Circuit's opinion in *Benson v. Arizona State Board of Dental Examiners*[137] is typical. In considering Sherman Act claims challenging a state dental board's refusal to recognize out-of-state licenses, the court easily found the necessary "clear articulation" in the state's statute permitting the Board "in its discretion," to adopt reciprocity rules.[138] Contrary examples involve boards acting in *contravention* of state policy. In *Goldfarb v. Virginia*,[139] the Supreme Court held that although a state bar association was a state agency for purpose of "investigating and reporting the violation" of ethical rules promulgated by the Supreme Court of Virginia,[140] it could not enjoy immunity for its price-fixing because it acted contrary to the state's clearly articulated competition policy.[141]

As clear as it is that licensing boards pass the first prong, it is equally clear that many would fail the second if subjected to it. The Supreme Court has recognized the necessary supervision only where states actually "exercise ultimate control over the challenged anticompetitive conduct,"[142] overturning schemes

---

[135] *See* Hoover v. Ronwin, 466 U.S. 558, 567--68 (1984) ("[W]hen a state legislature adopts legislation, its actions constitute those of the State and *ipso facto* are exempt from the operation of the antitrust laws.") (citations omitted); Massachusetts School of Law at Andover v. American Bar Association, 107 F.3d 1026, 1036 (3d Cir. 1997); STATE ACTION TASK FORCE, *supra* note 63, at 6; Bobrow, *supra* note 39, at 1487.

[136] See, e.g. *Earles*, 139 F.3d at 1044. *See also* Havighurst, *supra* note 39, at 599. ("[F]ew things are more foreseeable than that a trade or profession empowered to regulate itself will produce anticompetitive regulations.").

[137] 673 F.2d 272 (9th Cir. 1982).

[138] *Id.*, at 275.

[139] 421 U.S. 773 (1975).

[140] *Id.* at 777 (quoting Virginia Code Ann. § 54-49 (1972)).

[141] *Id.* at 791. See also *FTC v. Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (F.T.C. 1988) (refusing to find the requisite "clear articulation" necessary under *Midcal* for an optometry board that had passed onerous advertising restrictions despite contrary instructions from the state).

[142] *Patrick*, 486 U.S. at 101. See also *Midcal*, 445 U.S. at 105--06 (finding inadequate supervision because the "State does not... engage in any 'pointed reexamination' of the program"). Although decided decades before *Midcal*'s two-step formulation, *Parker* itself emphasized the fact that the challenged restriction did not take effect until approved by the state in finding immunity. *Parker* 317 U.S. at 352.

where states had the potential to review but never used it.[143] Even schemes where the State provides the final authorization of a restriction can be found lacking in supervision if the state uses a "negative option" that allows a state's silence to pass for approval.[144] For most licensing boards, their restrictions become operational upon, at most, a rubber stamp from the state. The typical case falls short of the "pointed reexamination" and affirmative pronouncement by the state, required by *Ticor*, that signals that "the State has played a substantial role in determining the specifics of the economic policy."[145]

Thus boards' status under *Parker* turns on whether they are subject to the requirement of supervision at all. In *Town of Hallie v. Eau Claire*, the Court found a municipality immune under *Parker* because it was acting pursuant to the state's "clear articulation," despite being unsupervised. The court reasoned that for municipalities, it was not necessary to ensure that the actor seeking immunity was actually following the articulated state policy, since there was no "real danger that [it] is acting to further [its] own interests, rather than the governmental interests of the State."[146] Although *Hallie* did not provide a test for determining which entities were entitled to this fast track to immunity, it provided a hint in a footnote: "In cases in which the actor is a state agency, it is likely that active state supervision would not be required, although we do not here decide that issue."[147]

Many lower courts have applied *Hallie*'s footnote 10, although dicta, like law.[148]But by and large these courts have not interpreted Hallie's footnote 10 to mean that all entities that have a colorable claim to being a "state agency" (which probably includes occupational licensing boards) are automatically exempt from the supervision requirement. Rather, most lower courts analyze the function, composition, and accountability of the entity claiming immunity when considering its status under Hallie's footnote. The circuits are split on this question of how state occupational licensing boards fare under this analysis.

Some courts have concluded that occupational boards are among the "state agencies" to which the Court was referring, and thus exempted boards from *Midcal*'s supervision prong.[149] For example, in *Earles v. State Bd. of Certified*

---

[143] *See, e.g., Ticor*, 504 U.S. at 638 ("The mere potential for state supervision is not an adequate substitute for a decision by the State.").

[144] *Id.* at 639--40. Likewise, the FTC has held that "silence on the part of the state does not equate to supervision." N.C. Bd. of Dental Exam'rs, 151 F.T.C. 607, 632 (2011).

[145] *Ticor*, 504 U.S. at 635. Boards are typically subject to several lesser mechanisms that improve their accountability to the state, like member disclosure requirements, adherence to state administrative procedure acts, and public access to meetings and minutes. But at least one lower court has held these devices inadequate to establish supervision under *Midcal*'s second prong. N.C. Bd. of Dental Exam'rs, 151 F.T.C. at 630--32.

[146] *Hallie*, 471 U.S. at 47.

[147] *Hallie*, 471 U.S. at 46 n. 10.

[148] Elhauge, *supra* note 134, at 693. For collections of cases relying on footnote 10, see 1A PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 212.7, at 166 (3d ed. 2006) and C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirements for State Action Antitrust Immunity: The Case of State Agencies*, 41 B. C. L. Rev. 1059, 1063--64 (2000).

[149] *See, e.g., Earles*, 139 F.3d at 1041; *Hass v. Oregon State Bar*, 883 F.2d 1453, 1459 (9th Cir. 1989).

Public Accountants of Louisiana,[150] the Fifth Circuit declined to apply *Midcal*'s supervision prong to a state board, and thus rejected Sherman Act claims against it.[151] The opinion reasoned that Louisiana's Board of Certified Public Accountants "is functionally similar to a municipality" since "the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition." Similarly, in *Hass v. Oregon State Bar*, the Ninth Circuit held that the state bar, as an agent of the state Supreme Court, "is a public body, akin to a municipality for the purposes of the state action exemption." The court cited the board's three (of fifteen) non-lawyer members and its public meetings and open records as evidence of the board's "public" nature. Finding no danger that the bar, acting as a state licensing board, was "pursuing interests other than those of the state," the court did not apply the supervision prong to its claim of immunity.[152]

Not all courts have been comfortable eliding *Midcal*'s second prong when considering action by a state agency, especially when that agency is an occupational licensing board. But these holdings are either weak or narrow, and so offer litigants little hope in succeeding in an antitrust suit against a professional board.

Before last year, the precedents supporting the requirement of supervision for licensing boards were weak because they at most implied, without squarely holding, that supervision would apply. For example, In *FTC v. Monahan*,[153] then-Judge Breyer writing for the First Circuit rejected a licensing board's claim that state action immunity automatically prevented it from having to comply with a federal subpoena in an antitrust case. The court explained that whether the state supervision condition applied "depend[ed] on how the Board functions in practice," which in turn depended on the information requested in the subpoena. The opinion thus ordered the board to comply with the subpoena, but made no holding on the merits of the Board's claim that its public nature meant it need not show state supervision to enjoy Parker immunity.[154] Similarly, the Ninth Circuit, in an opinion that does not cite its somewhat contrary opinion in Hass, observed that a board "may not qualify as a state agency" because it has private members with "their own agenda which may or may not be responsive to state labor policy."[155] As in Monahan, there was no merits opinion after the remand.

Without a case squarely holding a licensing board to antitrust scrutiny, precedent like, *Hass* and *Earles* had been enough to cause scholars to assume away the possibility of an antitrust suit against a licensing board and to deter litigants from pursuing such suits in significant number.[156] If they acknowledged that

---

[150] 139 F.3d 1033 (5th Cir. 1998).
[151] *Id.* at 1041.
[152] 883 F.2d 1453, 1459 (9th Cir. 1989).
[153] 832 F.2d 688 (1st Cir. 1987).
[154] *Id.* at 690.
[155] Wash. State Elec. Contractors Ass'n, Inc. v. Forest, 930 F.2d 736, 737 (9th Cir. 1991).
[156] *C.f.* Havighurst, *supra* note 39, at 597 (observing that despite the FTC's success in a case against the Texas State Board of Accountancy, "[t]here were few follow ups of this kind.").

question of *Parker* immunity for occupational boards was technically open as a matter of doctrine,[157] they seemed to assume that as a practical matter the courtroom door was closed.

Last year, the Fourth Circuit took these holdings out of the hypothetical realm and squarely held a licensing board to Midcal's second prong, thus creating a circuit split with the Ninth and Fifth Circuits. But its holding, unfortunately from our point of view, is very narrow; it would leave many boards as presently comprised immune from suit. In *North Carolina State Board of Dental Examiners v. FTC*, the Fourth Circuit upheld an FTC decision that struck down North Carolina's dentistry board's claim for immunity based on its failure to show adequate supervision.[158] In a lengthy opinion below, the Commissioner had explained that whether an entity must satisfy *Midcal*'s supervision prong depended not on its formal label as a "state agency," but rather on the "tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated,"[159] The Fourth Circuit agreed, holding that "when a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership... both parts of Midcal must be satisfied." The panel concluded that a board dominated by practitioners who were elected by other industry members fit that description.

But as the concurrence highlighted, under the rule of the case, practitioner-dominance is not sufficient to show that a board is a "private actor" in need of state supervision. The concurrence explained that the case's holding "turns on the fact that the members of the Board, who are market participants, are elected by other private participants in the market." Under the Fourth Circuit's rule, boards comprised of private competitors appointed by a governor (ubiquitous among licensing boards[160]) would not be subject to Midcal's supervision prong and therefore would almost always enjoy Parker immunity. Thus while North Carolina Dental Examiners, Hass, and Earles do form a circuit split, the law on the side of holding boards to both Midcal prongs is relatively narrow and weak, offering antitrust plaintiffs little hope of holding a board to strictures of the Sherman Act.

2. The Common Route to Challenging State Licensing Restraints: Due Process and Equal Protection

With powerful antitrust immunities in place, the only viable avenue for consumers or would-be professionals wishing to challenge the actions of state licensing boards is to make a constitutional claim.[161] Like all state regulation,

---

[157] Some scholars have recognized the doctrinal uncertainty. *See, e.g.*, Bona, *supra* note 39, at 42; Bobrow, *supra* note 39, at 1489.

[158] N.C. Bd. of Dental Exam'rs, 151 F.T.C. 607 (2011).

[159] *Id.*, at 8. In this respect, the opinion echoes the FTC's State Action Task Force Report, which advocated requiring supervision for "any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market." STATE ACTION TASK FORCE, *supra* note 63, at 55, *quoting* AREEDA & HOVENKAMP, *supra* note 148, ¶ 224 at 501. See also *id.* at ¶ 227b, ¶ 224a.

[160] Almost all the licensing boards we surveyed are appointed by the governor. See Appendix A.

[161] Katsuyama, *supra* note 134, at 567--69.

professional licensing restrictions must not violate the due process and equal protection clauses of the Fourteenth Amendment. Due process prevents a state from denying someone his liberty interest in professional work if doing so has no rational relation to a legitimate state interest.[162] Similarly, equal protection requires that states distinguish licensed professionals from those excluded from practice on some rational basis related a legitimate state goal.[163] The two analyses typically conflate into one question: did the licensing restriction serve, even indirectly or inefficiently, some legitimate state interest?[164]

That burden is easily met, as is illustrated by the leading Supreme Court case on the constitutionality of professional licensing schemes. In *Williamson v. Lee Optical*,[165] the Supreme Court upheld a state statute preventing opticians from fitting patient's existing lenses in new frames without a prescription from an ophthalmologist or optometrist.[166] The *Williamson* plaintiffs sued on the theory that the scheme was designed to artificially increase demand for optometry services, and therefore violated the due process and equal protection clauses. The Court implicitly recognized a liberty right under the due process clause to pursue one's chosen occupation.[167] But since that right is not sufficiently "fundamental" to give rise to strict scrutiny, and because opticians are not a protected class under the equal protection clause,[168] both claims were subject to rationality review.[169] The Court rejected the challenge, making clear that any possible justification for the restriction, however thin, was enough.[170] Other cases have further held that, to survive rationality review, the proffered justification need not have actually motivated the legislature; it may be post-hoc and prepared only for litigation.[171]

The Supreme Court has only once found an occupational licensing restriction to fail rationality review, and then only because an otherwise valid licensing requirement was unlawfully applied to an individual. Like most states, New

---

[162] Anthony B. Sanders, *Comment: Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigmiles v. Giles*, 88 MINN. L. REV. 668, 671--74 (2003-2004).

[163] *Id.* at 674--78.

[164] Katsuyama, *supra* note 134, at 567--69.

[165] 348 U.S. 483 (1955).

[166] *Id.* at 486. Although the case considered state legislative activity, subsequent cases have clarified that the case's analysis is applicable to administrative rules promulgated by state licensing boards.

[167] Although the *Lee Optical* court did not make this explicit, subsequent cases have. *See, e.g. Meadows*, 360 F.Supp.2d at 813 ("The right to pursue to 'common occupations of life' is a protected liberty interest, subject to reasonable limitations.") (quoting *Blackburn v. City of Marshall*, 42 F.3d 925, 941 (5th Cir. 1995)).

[168] *See* Craigmiles v. Giles, 312 F.3d 220, 223--24 (6th Cir. 2002) ("Although the licensing requirement has disrupted the plaintiffs' business, the regulations do not affect any right now considered fundamental and thus requiring more significant justification.").

[169] *Lee Optical*, 348 U.S. at 487--88.

[170] *Id.* at 487 It found enough rationality in the fact that "in some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision or alleviate the eye condition." Thus the Court upheld the statute even though it conceded that "[t]he Oklahoma law may exact a needless, wasteful requirement in many cases." *Id.*

[171] Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & Liberty 898, 905--07 (2005).

Mexico requires attorneys to exhibit good moral character in order to sit for the bar exam. In *Schware v. New Mexico*,[172] the Court found such a licensing requirement, on its face, to pass rationality review, but it found that the New Mexico Supreme Court had acted irrationally when it denied a recovered communist permission to sit for the exam. Because of its politically-charged subject matter, *Schware* has largely been limited to its facts, and in any case it expressly approved of a state's ability to require even so subjective a quality as "good moral character" of its professionals.[173]

In applying this Supreme Court precedent to the activity of state licensing boards, lower courts have found even extremely thin justifications for anticompetitive licensing restrictions to suffice for rationality review. In *Meadows v. Odom*,[174] a Louisiana district court accepted the state board's contention that licensing florists helped promote health and safety by decreasing the risk of pricks by wires in haphazardly arranged bouquets.[175] Similarly, a California district court upheld the California Structural Pest Control Board's requirement that exterminators of rats and pigeons, but not those of skunks and squirrels, obtain a state license.[176]

One circuit has held that insulating professionals from competition is *itself* a legitimate state interest, making matters even more difficult for plaintiffs alleging harm to competition. The Tenth Circuit in *Powers v. Harris*,[177] distinguished *intrastate* protectionism, which it considered constitutionally permissible, from *interstate* protectionism, which it acknowledged was illegitimate under the dormant commerce clause.[178]

Contrary holdings are rare. The Sixth Circuit gave the campaign to invalidate anticompetitive state licensing on constitutional grounds[179] its most significant victory in *Craigmiles v. Giles*.[180] Using reasoning explicitly rejected by *Powers*, the court invalidated Tennessee's restriction on unlicensed casket sales. The *Craigmiles* court was unusually skeptical about justifications advanced by the state board, who argued that shoddy caskets presented a public health risk.[181] The court

---

[172] 353 U.S. 234 (1957).

[173] *Schware*, 353 U.S at 239.

[174] 360 F.Supp.2d 811, 813 (M.D.La 2005).

[175] The court quoted the testimony of a retail florist, testifying as an expert, to support the notion that licensing florists reflected the state's "concern for the safety and protection of the general public." *Id.* at 824. The florist testified "I believe that the retail florist does protect people from injury.... We're very diligent about not having an exposed pick, not have a broken wire... and I think that because of this training, that prevents the public from having any injury." *Id.*

[176] Merrifield v. Lockyer, 388 F.Supp.2d 1051 (N.D.Cal. 2005). It was enough to pass rationality review that the covered pests were more commonly found inside structures than the non-covered pests, suggesting they were a more natural target for regulation. *Id.*

[177] 379 F.3d 1208 (10th Cir. 2004), *cert. denied* 544 U.S. 920 (2005).

[178] *Id.* at 1219.

[179] The public interest law firm Institute for Justice is at the forefront of this movement, and many of the cases cited in this section were argued by their attorneys. *See* www.ij.org.

[180] 312 F.3d 220 (6th Cir. 2002).

[181] *Id.* at 225.

found that only one justification did not reek with "the force of a five-week-old, unrefrigerated fish,"[182] and that was the monopoly profits it allowed funeral directors to collect in selling coffins.[183] Unlike the *Powers* court, the Sixth Circuit deemed such economic protectionism "illegitimate" and invalidated the restrictions because it failed even "the slight review required by rational basis review."[184]

Powers' condemnation of *interstate* protectionism suggests that the "dormant" commerce clause may be an alternative means of attacking the constitutionality of occupational licensing restrictions,[185] but cases brought on this theory have failed. Most states do not recognize occupational licenses from other states, and plaintiffs have argued that such "non-reciprocity" discriminates against out-of-state commerce in favor of in-state interests in violation of the commerce clause. But courts have rejected this claim, explaining that states have a legitimate interest in applying their own particular requirements to professionals. "Non-reciprocity" licensing schemes pass rationality review as long as they apply the same licensing requirements to applicants applying from within the state and to those coming from outside.[186]

III. THE NORMATIVE CASE: WHY SHERMAN ACT LIABILITY FOR STATE LICENSING BOARDS IS A GOOD IDEA

State action immunity for occupational licensing boards is an anachronism with an ever-increasing price tag as more professionals and more services come under boards' authority. Constitutional suits have done little to solve the problem. This section makes the normative case for lifting antitrust immunity for state licensing boards. It begins by illustrating the close fit between the Sherman Act's purpose and the economic harm from heavy-handed licensing regulation. We argue that it is antitrust, not constitutional law, that provides the most logical and effective mechanism to evaluate the costs and benefits of occupational licensure.

We then contend the that the principal argument against broadening Sherman Act liability—that it disrupts the balance of power between the states and the federal government—is especially unpersuasive in the licensing context. As the scholarly debate flowing from *Midcal* revealed, concerns for federalism are at their height when federal laws displace state regulations enacted by a locally

---

[182] *Id.* at 225 (quoting *US v. Searan*, 259 F.3d 434 (6th Cir. 2001)).

[183] *Craigmiles*, 312 F.3d at 228. The court noted that the restriction allowed funeral homes to "mark up the price of caskets 250 to 600 percent." *Id.* at 224.

[184] *Id.* at 228--29.

[185] *See also* Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. REV. 627, 646 (2006) ("[O]ne can imagine egregious situations in which the impact of state regulation falls almost entirely on out-of-state interests, but then it seems the dormant Commerce Clause would be sufficient to handle the problem.").

[186] *See, e.g.*, Locke v. Shore , 634 F.3d 1185 (11th Cir. 2011), Kirkpatrick v. Shaw, 70 F.3d 100, 103 (11th Cir. 1995); Scariano v. Justices of the Supreme Court of Indiana, 38 F.3d 920, 928 (7th Cir. 1994).

accountable government with constituent participation. This does not describe restrictions created by practitioner-dominated licensing boards.

A. Antitrust Liability for Professional Licensing: An Economic Standard for Economic Harm

The Sherman Act—famously called the Magna Carta of free enterprise[187]—protects competition as a way to maximize consumer welfare. According to courts and economists alike, competition is harmed when competitors restrict entry or adhere to agreements that suppress incentives to compete. When these kinds of restrictions are naked and horizontal, liability attaches *per se*, but even when they are not, competitors must prove that they provide a net benefit to consumers in order to pass muster under the rule of reason. At bottom, both the *per se* rule and the rule of reason ask a single question: Is competition (and therefore consumers) harmed or helped by this activity? Because this test, unlike rationality review under the constitution, best safeguards consumer welfare, it should be used to evaluate occupational licensing restrictions.

1. Sherman Act Policy and the Competitive Harm of Licensing: A Close Fit

Without the veneer of "professional licensing," some board restrictions epitomize the evil at which modern antitrust policy is aimed. Like all agreements between competitors, licensing schemes can be used for competitive good or competitive evil. The normative question in both traditional cartel cases and licensing context should be the same: Does the combination, on net, improve consumer welfare?[188] To ensure that this important question is asked and answered in the licensing context, antitrust law and its tools for balancing anti- and pro-competitive effects should be brought to bear on licensing schemes.

This close fit between the Sherman Act's intended target and the economic harm of excessive licensing can be illustrated by showing that many restrictions promulgated by occupational boards are functionally identical to business practices held unlawful under §1. To cut hair legally in Georgia, a candidate must pass a test designed by her would-be competitors proving she can file and polish nails.[189] But when a gas burner manufacturer was denied approval by a private standard-setting association that used a test "not based on objective standards," but rather influenced by his competitors, the Supreme Court found Sherman Act liability

---

[187] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

[188] *Cf.* Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. Ill. U. L. Rev. 457, 484--85 (2003-2004) ("If the government must protect consumers from the ill effects of monopolies, then monopolistic practices by government licensing agencies should also be prohibited. The potential victims are the same (consumers); the potential injury is the same (unreasonable prices); and the potential wrongdoers are the same (monopolistic producers).").

[189] GEO. STAT. § 43-10-1 et seq. *available at* http://sos.georgia.gov/acrobat/PLB/laws/28_Cosmetology_43-10.pdf.

appropriate.[190] Similarly, Ohio attorneys cannot advertise their services using the words "cut rate" or "discount" or "lowest" to describe their fees without facing sanction from the licensing board.[191] But similar restrictions on truthful price advertising, when imposed by private associations of competitors rather than as a licensing requirement, have been found *per se* illegal.[192] And all lawyers must prove their "good moral standing" to join a state bar, but when a multiple listing service comprised of competing real estate agents tried to impose a "favorable business reputation" requirement on its members, a court found the requirement to violate the rule of reason because the standard was vague and subjective. It failed Sherman Act scrutiny because it gave the listing service the power to exclude competitors in arbitrary and anticompetitive ways.[193]

Sometimes the match between a licensing restriction and an unlawful private restriction on trade is more analogical than literal, but even here the anticompetitive risk is the same. For example, non-recognition of out-of-state licenses subdivides the national market for services and insulates professionals in one state from competitors in another. Market allocation, *per se* illegal under §1 of the Sherman Act when agreed to by private competitors, has a similar economic effect. Similarly, when a licensing board dominated by practitioners tightly controls the standards of professional practice, it acts like a standard-setting association passing judgment on its competitor's products. In both contexts there is potential for consumer benefit and opportunistic self-dealing, but only private standard-setting associations are subjected to antitrust scrutiny.[194]

Thus licensing schemes can be similar to cartel agreements in substance, which alone may justify antitrust liability. But making matters even worse for consumers, licensing schemes come in a particularly durable form. Licensing boards, by their very nature, face few of the cartel problems that naturally erode price and output agreements between competitors. By centralizing decision-making in a board and endowing it with rulemaking authority through majority voting, professional competitors overcome the hurdle of agreement that ordinarily inhibits cartel formation. Cheating is prevented by imposing legal and often criminal sanctions—backed by the police power of the state—against professionals who break the rules. Finally, most cartels must fend off entry by new competitors from outside the cartel hoping to steal a portion of its monopoly rents. For licensed professionals, licensing deters entry and ensures that all professionals (at least those practicing legally) are held to its restrictions.

The similarities between cartel activity and licensing restrictions are highlighted here to suggest that licensing implicates some of the same

---

[190] Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

[191] Ohio Rules of Professional Conduct, Rule 7.1 comment 4, *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf.

[192] *See* AREEDA & HOVENKAMP, *supra* note 148, ¶2023 (collecting cases).

[193] United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

[194] AREEDA & HOVENKAMP, *supra* note 148, ¶ 2230. *C.f.* C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489 (9th Cir. 1952).

anticompetitive risks that private activity does, and so is a natural target for the Sherman Act. But just because both kinds of restrictions can be held to antitrust scrutiny does not mean that the outcome of that analysis will be the same. As we explain in detail in Part IV, *per se* condemnation of board activity is inappropriate, and under our proposed modification to the rule of reason to fit the licensing context, some restrictions will be approved that would be condemned if used by a private cartel. The point here is that if excessive licensing threatens competition, then it should be held to a standard designed to address competitive harm. Modern antitrust law provides just such a standard.

2. Constitutional Suits and their Limited Ability to Protect Consumers

Constitutional suits alone cannot curtail the anticompetitive effects of professional licensing for two reasons. First, and perhaps most importantly, they are almost impossible to win.[195] Second, successful challenges vindicate an individual's right to work, not a consumer's right to low prices driven down by robust competition. It is a happy coincidence that often times these interests are tethered. But because the constitutional question is framed as a struggle between the individual and the state, the standard—rational basis—requires no direct inquiry into competitive effects. It is antitrust, not constitutional law, that can directly address the economic evils of licensing by requiring restrictions to be economically reasonable. And it is the rule of reason, not rationality review, that can balance pro- and anti-competitive effects of a restriction and ensure that only the efficient survive.

Suits challenging state licensing restrictions on constitutional grounds are rarely successful because plaintiffs must overcome powerful presumptions in favor of the state. In the professional licensing context, "the demands of rational basis review are not impossible to overcome, but they are extraordinarily high."[196] A law for which "there is any conceivable state of facts that could provide a rational basis," will survive constitutional challenge;[197] even the flimsiest justification will do. The legitimizing rationale may be post-hoc, unsupported by facts or evidence,[198] and even supplied by the judge himself[199] if the state fails to articulate a sufficiently rational basis in its brief. As one judge puts it, rational basis scrutiny "invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute."[200] With so many ways to validate a statute, plaintiffs are forced to prove a negative, a nearly impossible task.[201]

---

[195] *See generally* Neily, *supra* note 171.
[196] Sanders, *supra* note 162, at 692.
[197] Beach Communications v. FCC, 508 U.S. 307, 313 (1993).
[198] Neily, *supra* note 171, at 905--07.
[199] Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, The Circuit Split, and Why It Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 153 (2011-2012) (noting that plaintiffs must anticipate not only rationales "stated in the regulation, or... stated in the legislative records, but also whatever the judge may think of while on the bench").
[200] Arceneaux v. Treen, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).
[201] Sandefur, *supra* note 188, at 500 n. 234.

When constitutional suits are successful, the right vindicated is of the individual against the government, not the right of the consumer against a self-dealing industry. Sometimes these interests are aligned; robust protection for the right to work means more competitors in the profession, which in turn could mean lower prices for consumers. But the campaign to invoke constitutional rights against heavy-handed professional regulation has been framed as a revival of the right to livelihood,[202] not as a consumer welfare movement. Thus, courts hearing constitutional challenges to licensing schemes are confronted with arguments about what kinds of economic activity a state may regulate in the first place, not arguments about whether the benefits of licensing outweigh its costs. When the dispute is framed as a question about when states can legitimately use their police power for economic regulation, courts can invoke the specter of *Lochner* to justify a hands-off approach.

Nowhere is it more apparent that constitutional law and antitrust law serve different purposes than in the *Powers v. Harris* decision. In that case, the Tenth Circuit upheld a licensing restriction as rationally related to Oklahoma's "legitimate state interest" in insulating incumbent professionals from competition. The court noted that "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[203] Although other circuits have held otherwise, the Supreme Court denied certiorari to resolve the circuit split, essentially blessing the Tenth Circuit's holding as one possible interpretation of "legitimate state interest." This interpretation eviscerates constitutional law's ability to safeguard robust competition and its benefits to consumer welfare.

B. Antitrust Federalism: Its Modern Justifications and Applicability to Sherman Act Liability for Licensing Boards

The most serious argument against Sherman Act liability for state licensing boards is that it would upset the balance between state and federal power struck in *Parker* and its progeny. As discussed above, the doctrinal question is technically unsettled, even if most courts and commentators take for granted that boards are immune under *Parker*. That doctrinal uncertainty raises a normative question: *should* boards enjoy state action immunity? In this section, we argue that they should not.

We reveal the normative foundation of antitrust federalism by surveying the *Midcal* case law and the voluminous scholarship interpreting it, showing that although the various accounts differ in other ways, they all agree that self-dealing, unaccountable decision-makers should face antitrust liability. We argue that state licensing boards fall squarely in this category. Therefore, all practitioner-dominated

---

[202] *See, e.g.* McCormack, *supra* note 70.

[203] *Powers*, 379 F.3d at 1221.

boards should be subjected to *Midcal*'s supervision requirement, regardless of who selects their members.

1. The Parker *Debate: Accountability is Key*

Over a dozen Supreme Court cases since *Parker* have wrestled with defining exactly who, and what kind of conduct, enjoys antitrust immunity.[204] Likewise, much ink has been spilled in the law reviews over the normative commitments behind the Court's handwringing. Do we require state supervision because without it federalism, as the underlying justification for immunity, is not implicated? Or do we require supervision because we trust governments, but not private entities, to restrict competition only to the extent that it serves the public interest? Since *Parker,* justifications for antitrust federalism resting solely on comity have come in for harsh treatment by both commentators and courts.

Instead, the law reserves state action immunity for bodies whose structure and process ensure they act in the public interest. In other words, political accountability is the price a state must pay for antitrust immunity.[205] So held the Court in *FTC v. Ticor Title Insurance Company*,[206] explaining that "[s]tates must accept political responsibility for actions they intend to take."[207] The Court emphasized that deference to state regulation is justified only when the state can be held to account for its decisions: "Federalism serves to assign political responsibility, not to obscure it."[208]

This sentiment is echoed in the scholarship interpreting *Midcal*. Probably the three most cited commentators from the debate are William Page, John Shepherd Wiley, and Einer Elhauge, all writing within a decade after *Midcal*, and all calling for reforms to state action doctrine that would more effectively sort captured from politically legitimate state regulation. Each proposes a different theory and disagrees with the others in significant ways, but all their arguments would deny immunity for licensing boards, at least as they presently operate.

In the year following *Midcal*, William Page applauded the "clear articulation" requirement as protection against industry self-dealing through state agency capture.[209] If a state wanted to enjoy federal antitrust immunity, it had to make a clear statement—through an elected and politically accountable body—expressing a policy in conflict with the Sherman Act. To Professor Page, these legislative statements assured "valid popular consent" for anticompetitive

---

[204] Note 123, *supra*, lists the cases decided after *Midcal*. The cases between *Parker* and *Midcal* include: City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); and *Goldfarb*, 421 U.S. 773 (1975).

[205] *See* Havighurst, *supra* note 39,, at 591 ("The active-supervision requirement... may also embody a federal expectation that any state that denies consumers the benefits of competition must provide some alternative protection for their interests.").

[206] 504 U.S. 621 (1992).

[207] *Id.*, at 636.

[208] *Id.*

[209] William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 BOSTON U. L. REV. 1099 (1981).

regulations, even if the details were later hashed out by an unelected agency or committee. Five years later, John Shepard Wiley, Jr. took an opposing view in criticizing *Midcal*,[210] but like Professor Page, he assumed that an essential ingredient of antitrust federalism is public participation. His prescription allowed for Sherman Act scrutiny for state restrictions that resulted from producer capture, implying that federal antitrust law should bow to state regulation only when that regulation is at least minimally responsive to the public.

Einer Elhauge disagreed with the framing of the *Midcal* debate (by the Court in post-*Midcal* cases like *324 Liquor Corp. v Duffy*[211] and *Fisher v. City of Berkeley*[212] and by commentators like Page and Wiley) precisely because it obscured the role that politically-unaccountable self-dealing played in antitrust federalism. He argued against what he called the "conflict paradigm"—in which state action immunity is perceived as a battle between federal interest in free markets and state interest in protectionism—in favor of his "more straightforward approach" of simply asking whether "under the [state's] statutory scheme, the person controlling the terms of the restraint... was financially interested."[213] Thus Elhauge's vision of antitrust federalism overlaps with Page's and Wiley's where it sees local political legitimacy—to Elhauge, financial disinterest—as a prerequisite to immunity.[214]

When the FTC published its State Action Task Force Report in 2003, it adopted what had become the consensus view: antitrust federalism was defensible only when a state could be held to account for an anticompetitive restriction.[215] According to the report, the purpose behind state action immunity is to exempt laws and regulations that restrict competition and thus harm some market participants but that also, on balance, benefit the public and so are attractive to voters. Immunity is necessary because nearly all government action changes the

---

[210] John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986).
[211] 479 U.S. 335 (1987).
[212] 475 U.S. 260 (1986).
[213] Elhauge, *supra* note 134, at 685.
[214] Many other scholars have writing on this topic have said that separating politically accountable decision making from self-dealing should be the main goal of the state action test. *See, e.g.*, Hovenkamp, *supra* note 185, at 633 (arguing that "antitrust need not countenance restraints in which the effective decision makers are the market participants themselves."); Jim Rossi, *Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism*, 83 WASH. U. L. Q. 521, 561 (2005) ("State-Action immunity, implied from the Sherman Act, affords immunity for purposes of promoting federalism – valued because of the democratic legitimacy if affords, not because state decisions in and of themselves are sacrosanct."); Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293 (1998); Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1253 (1997) (concluding that regulations are immune from antitrust scrutiny "provided those regulations were decided by an open, participatory political process"); David McGowan & Mark A. Lemley, *Antitrust Immunity: State, Action and Federalism, Petitioning and the First Amendment*, 17 Harv. J. L. & Pub. Pol'y 293 (1994); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227 (1987); Merrick B. Garland, *Antitrust and Federalism: A Response to Professor Wiley*, 96 YALE L.J. 1291 (1987).
[215] STATE ACTION TASK FORCE, *supra* note 63, at 14.

competitive environment and creates some market losers. But the report recognized that meaningful voter support is necessary to justify immunity.

2. State Licensing Boards: Self-interested and Unaccountable Consortiums of Competitors

These perspectives on *Parker* and *Midcal* suggest that where the temptation of self-dealing is especially high and the potential for holding officials accountable especially low, state action immunity is not appropriate. For state licensing boards, both conditions hold, to which the absurdity of some licensing restrictions can attest. First, and most importantly, under the current regime, occupational licensing is left up to members of the profession themselves. Second, the group most hurt by excessive professional restrictions—the consumer—is particularly ill-represented in the political process of licensure. When *Parker* is used to protect incumbent professionals in their efforts to restrict entry into their markets, it creates the very situation *Midcal* warned against. It casts a "gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[216]

Most state licensing boards, as our study of boards in Florida and Tennessee confirms, are dominated by practitioners in the field.[217] On the one hand, practitioner-dominance is inevitable. Tailoring restrictions to inure to the benefit of the public (restrictions that tend to encourage safe and competent practice) usually requires expertise in the profession. Lay people are unable to make judgments about the quality and risks of professional service; indeed that is one of the pro-competitive justifications behind professional regulation in the first place. But the need for expertise creates a problem. It means the fox guards the hen-house; those who have the most to gain from reduced consumer welfare in the form of higher prices are tasked with protecting consumer welfare in the form of health and safety.

Public participation in state board activity is very low. The typical state board is comprised of appointed members[218] and board meetings are technically open to the public but usually unattended by nonmembers, although most states' sunshine laws require the publication of minutes. Individual consumers lack the incentive to participate in process of licensing regulation; rarely would it be rational for a consumer to take the time and effort to try to change a licensing rule in the hopes of a cheaper haircut. Lobbying groups could fill that void by aggregating the interests of consumers, but even with this mechanism, meaningful consumer participation in the political process is difficult, as public choice theory illustrates. The most motivated public participants are the practitioners at the margins of the profession hoping for entry. As discussed above, sometimes the incentives of would-be professionals are aligned with consumers, but not always.

---

[216] *Midcal*, 445 U.S. at 943.

[217] *See supra*, TAN 38&39 and Appendix.

[218] Often nominees are selected from a lists provided by the professional group itself. Havinghurst, *supra* note 39, , at 596. Some boards are comprised of members elected directly by members of the profession. See, e.g., *N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 627.

The most influential accounts of antitrust immunity would exclude practitioner-dominated boards from *Parker* protection. In his straightforward process-based account of state action, Elhauge recognized the anticompetitive inevitability of self-regulation. His normative vision of antitrust federalism, modest compared to Wiley's and Page's in its call for exposing state regulation to antitrust liability, would deny immunity to entities whose members stand to financially profit from anticompetitive regulation. This would certainly describe the typical practitioner-dominated licensing board. As Elhauge's observed, "antitrust stands for the... limited proposition that those who stand to profit financially from restraints of trade cannot be trusted to determine which restraints are in the public interest."[219]

If state licensing fails Elhauge's test for immunity, then it must also fail under Wiley's and Page's broader definitions of illegitimate capture. Capture is often a subtle and debatable fact; some would argue that the Federal Reserve Board and staff is captured by Wall Street because so many of its members come from or go back to Wall Street banks, or because the banks are allowed so much access that members of the board begin to think like bankers. Whether the Fed is captured in these senses depends where one draws the line between enough and too much regulatory access. In the case of occupational licensing, however, this line-drawing is not a problem. By dint of their membership, they are literally and explicitly captured since practitioners enjoy a majority—often a supermajority—among the decision makers.[220] Licensing boards are born captured.

Cases like *Hass* and *Earles* that exempt state licensing boards from *Midcal*'s supervision prong are wrong because they fail to recognize this basic feature of board decision-making. These cases analogize licensing boards to municipalities because boards are "public," citing open meetings, public-minded mandates, and an affiliation with the state. But the cases fail to recognize that these features cannot meaningfully check self-dealing in the way that elections and public visibility check municipal officers from self-dealing at the expense of their citizens. A more searching, case-by-case approach, and one advocated by the FTC in *North Carolina Board of Dental Examiners*, would look to the actual accountability of the board to determine when there is "an appreciable risk that the challenged conduct may be the product of parties pursing their own interests rather than state policy."[221] The FTC, echoing Elhauge's argument, finds that risk whenever the entity "consists in whole or in part of market participants," and we agree.[222]

Such an entity differs significantly from the municipality in *Hallie*. In that case, the Court found that when a municipality regulates "there is little or no

---

[219] Elhauge, *supra* note 134, at 672.

[220] Here we have, to use Wiley's terminology, direct evidence of capture. He suggests judges "demand plaintiffs... identify producers who profit from the regulation's competitive restraint and who played a *decisive* political role in its adaptation." Wiley, *supra* note 210, at 769.

[221] STATE ACTION TASK FORCE, *supra* note 63, at 15.

[222] *Id.* at 55.

danger that it is involved in a *private* price-fixing arrangement."[223] Although the Court does not provide the reasoning for this conclusion, it is easily supplied. A municipality makes decisions through elected officials and civil servants. These decision-makers are charged with the public good,[224] and although only a very antiquated view of government would hold that their own self-interest is irrelevant, their actions achieve the minimum level of accountability and democratic legitimacy that we require to grant immunity.

The flaw of *Hallie*'s footnote is its failure to articulate what state agencies have in common with municipalities that justifies the assumption that "there is little or no danger" of self-dealing in both cases.[225] There is a diversity of state agencies[226] and for many it is undoubtedly true that they can be presumed to pursue the state's governmental interest, but no one could seriously think the same of a group of competitors appointed to regulate their profession.[227] It would require blindness to Adam Smith's sage observation that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[228]

Further, *North Carolina Board of Dental Examiners*'s reliance on industry-election is fatal to its ability to meaningfully curb occupational licensing abuses. To be sure, election by fellow competitors is probably even worse for the fate of competition under the board's authority, since industry members can be sure to select members who are most likely to protect incumbent interests. But the notion that governor-appointment can meaningfully solve the problem of self-dealing is unrealistic. Indeed all influential accounts of antitrust federalism, from Professor Wiley's focus on capture to Professor Elhague's focus on financial self-interest place the identity of the decision-makers, not their means of appointment, central to the question of immunity. *North Carolina*'s narrow holding would allow governors, however well-intentioned they may be in the appointment process, to hand the controls of regulation over to the regulated themselves, and walk away without any responsibility to oversee their activities.

Sound public policy dictates that any consortium of competitors be supervised by disinterested state agents, be subject to antitrust, or both. That the consortium of competitors is called a state board and given power by the state to regulate its profession does not make it more trustworthy, but simply more powerful and therefore more dangerous. Supervision by disinterested state agents

---

[223] *Hallie*, 471 U.S. at 47.

[224] *See generally*, Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J. L. & PUB. POL'Y 203 (2000-2001).

[225] Bobrow, *supra* note 39, at 1500.

[226] As the FTC has noted, "[w]hatever the case may be with respect to state agencies generally, however, the Court has always been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory boards consisting of market participants." *N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 619. Clark Havighurst has also advocated a case-by-case analysis of state agencies. *See* Havighurst, *supra* note 39,, at 598.

[227] *See id.*, at 596--99.

[228] ADAM SMITH, WEALTH OF NATIONS, 1776.

should be a minimum for a state board to receive antitrust immunity under *Hallie* and *Midcal*, the flourish in *Hallie's* footnote notwithstanding. If true independence is impossible, as is arguably true in the licensing context where the expertise of the regulated is essential to the agency's decision-making process, the need for active supervision to justify immunity is at an apex. Such a move would adopt the very common sense view we advocate: that competition law cannot abdicate when a powerful consortium of competitors regulates its own industry, even if the state has granted that power. Thus the Supreme Court should use the circuit split as an opportunity to embrace the step taken by the Fourth Circuit in *North Carolina* and then take it further by clarifying that all practitioner-dominated boards are subject to both *Midcal* prongs, regardless of their appointment process.

In one sense, such a holding is modest because it would not call into question vast amounts of state law; many areas of state regulation are not delegated to majority-industry boards, or at least are actively supervised by the state itself. The California Insurance Commission, for example, has an elected politician as its current head (in this case, one who never worked in the insurance industry). Likewise, many state agencies are comprised dominantly of civil servants with only nominal participation from members of industry. But in another sense, the change would be significant. Requiring state supervision for licensing boards claiming state action immunity creates the potential for sweeping changes to how over a third of the nation's workforce is regulated, since most licensing boards would fail the supervision prong if subjected to it.

IV. THE MECHANICS OF ANTITRUST LIABILITY FOR STATE LICENSING BOARDS

Since such a holding would put thousands of boards under the Sherman Act's microscope, we dedicate the last Part of this article to describing the logistics of such a regime. Section A outlines how Sherman Act suits against professional boards would proceed under this new regime. Since boards resemble private professional associations in their composition and incentives, the mechanics of subjecting them to antitrust scrutiny can be borrowed from that context: §1 of the Sherman Act provides the cause of action and the parties who sue and are sued parallel those in a traditional §1 suit. This section also recommends a modification to the rule of reason necessary in the licensing context; the standard should allow as procompetitive arguments gains to public safety and quality of service even when these gains flow directly from limitations on competition. It then addresses questions related to standing and the single entity doctrine. Section B then speculates about how states will react to this new regime and evaluates the competitive consequences of those reactions.

A. Imagining a New Regime

Some rules, like the traditional rule of reason, should be altered to accommodate arguments particular to licensing. But other doctrines, like standing, treble damages, and the single entity defense translate well into the licensing context.

1. The Standard: Rule of Reason as Applied to Licensing

The basic rule of §1 is the rule of reason. Under it, and since Standard Oil[229], only unreasonable restraints of trade are held illegal. Restraints without acceptable justification or whose justifications are too implausible are either held to be inherently unreasonable (i.e., per se illegal) or illegal under a quick-look rule of reason. The full-blown rule of reason is used to ferret out the good and the bad for restraints that might be justified to determine if the restraint is reasonable.

The full-blown rule of reason is used for "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[230]. The central question under a section 1 rule of reason analysis is whether a restraint will tend to substantially limit competition. Justice Brandeis formulated the question as whether the restraint "is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[231] Modern courts frame the question as one of balancing pro and anticompetitive effects of the restraint to determine its central tendency. ("the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit," once the defendant establishes procompetitive benefit; U.S. v. Microsoft 253 F.3d 34 (D.C. Cir. 2001)).

Not all benefits are considered "procompetitive" under the rule of reason. In perhaps the strongest condemnation of social welfare justifications, the Supreme Court in *National Society of Professional Engineers*[232] rejected a professional society's rule hindering comparison price-shopping for engineering services. The engineers argued that "awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare." The Court called the engineers' attempt to so justify the restraint "nothing less than a frontal assault on the basic policy of the Sherman Act."[233] In particular, public safety benefits that flow directly from a reduction of competition will not count according to *Professional Engineers,* because "the statutory policy precludes inquiry into the question whether competition is good or bad."

---

[229] Standard Oil Co. v. United States, 221 U.S. 1 (1911).
[230] National Society of Professional Engineers v. United States, 435 U.S. 679
[231] Chicago Board of Trade v. United States 246 U.S. 231 (1918)
[232] 435 U.S. 679 (1978).
[233] *Id.* at 695.

Under a conventional rule of reason analysis, the agreement must actually directly enhance competition in some way such as when a group of copyright holders create a new and valuable product together.[234] Of course, the most plausible benefits of many and perhaps most restraints of licensing boards flow directly from their limitations on competition. Curing the lemons problem or eliminating externalities might not be seen as procompetitive under the Engineers holding.

The basic policy justifications for licensing boards flow from the belief that free and unfettered competition will injure the public by lowering the quality of service. Under *Professional Engineers*, such justifications might not be viewed as procompetitive, and as a result the boards actions might be held illegal under a quick-look rule of reason or even held illegal per se. This, we think, would be a step too far.

The argument that boards benefit the public by protecting them from charlatans is not inherently implausible and deserves respect. We therefore advocate a modified rule of reason that would allow public safety and quality enhancement justifications to be argued on behalf of licensing boards even when these alleged benefits flow directly from the elimination or limitation of competition. When courts balance the competitive effects of a licensing restriction, they should allow boards to place service quality and public safety benefits on their side of the scale.

Modifying the rule of reason in this way to incorporate public health and safety arguments may not be as large a shift in doctrine as it appears at first glance. Although courts often purport to reject public interest justifications out-of-hand as always as irrelevant to a §1 analysis, this rejection is neither universal nor complete. Especially in the context of reviewing restrictions imposed by professional associations, courts have displayed a willingness to consider appeals to health and safety.

Even in *Professional Engineers*, the Court acknowledges that *Goldfarb*, decided just three years earlier by the Court, "noted that certain practices by members of a learned profession might survive scrutiny under the Rule of Reason" even if they would be viewed as violating the Sherman Act in another context.[235]

Lower courts have used this mixed message from the Supreme Court to find a place for social welfare justifications in rule of reason analysis. For example, the Third Circuit in *United States v. Brown University*[236] remanded a suit challenging an agreement among elite universities that failed the district court's quick look. The appellate court called for a full-blown rule of reason analysis that placed, on the pro-competitive side of the scale, justifications the lower court had rejected as "social welfare justifications." The Court said that proper rule of reason analysis would consider the benefits of making higher education available to the "needy"

---

[234] See the blanket licenses in Broadcast Music v. Columbia Broadcasting System 441 U.S. 1 (1979).

[235] *Id.* at 696.

[236] 5 F.3d 658 (3d Cir. 1993).

and of having a diverse student body at the elite schools.[237] The court explained that the financial aid agreement in place among the schools "may in fact merely regulate competition in order to enhance it, while also deriving certain social benefits," and said that if that were the case, it would survive Sherman Act scrutiny.[238]

Brown University may occupy the outer boundary of a court's willingness to entertain social welfare justifications for agreements restricting competition, but even the Supreme Court has softened its hard line against these arguments. In a decision that paralleled *Brown University*, the Supreme Court in *California Dental Association v. FTC* remanded a challenge against a dental association's advertising ban that failed the lower court's quick look.[239] By calling for a not-so-quick analysis of the restraint, the Court implied that the association's defenses of the ban—that it promoted quality of care and information by restricting one dimension of competition—were legitimate under the Sherman Act.[240]

Cal Dental and *Brown University* set a foundation for the proper standard for Sherman Act analysis of licensing board restrictions. As discussed in Part II, *supra*, unregulated markets for professional services can harm social welfare in two ways. First, allowing consumers a choice between low quality, low price services and high quality, high quality services is inefficient because those consumers choosing the low quality option will not fully internalize its costs (the externalities problem). Second, even if a full range of quality were socially desirable, information asymmetries would cause the market for high-quality services to unravel (the lemons problem). If licensing works to remedy these market failures, then average or minimum quality of service will be higher than under an unlicensed regime.

First, courts should accept in the context of licensing, as "procompetitive" justifications, arguments that a restriction improves consumer information or raises quality of service. Measuring quality of service is difficult, especially when it is impossible to observe a market unfettered by licensing, but the difficulty of quantifying competitive benefits is nothing new in rule of reason cases. Professional boards should be induced to bring their best evidence of pro-competitive effects to the suit; like in all Sherman Act cases, empirical data will be more convincing than a purely theoretical argument. Second, claims of quality improvement should be specific and tied to a theory of market failure that justifies government interference.[241] In other words, for a licensing restriction to pass muster under the rule of reason, it should closely fit the problem it is designed to solve. Finally, courts should consider whether other regulations could restore information symmetry or raise quality of service with less cost to competition. Put

---

[237] *Id.* at 677–78.
[238] *Id.* at 677.
[239] 526 U.S. 756 (1999).
[240] *Id.* at 779–81.
[241] This is similar to one of Wiley's requirements for lifting state action – that it does not "respond[] directly to a substantial market efficiency." Wiley, *supra* note 210, at 756.

another way, courts should consider whether there are less restrictive alternatives to the challenged licensing restriction.

This system for analyzing a licensing restriction—identifying a legitimate reason to license, analyzing the fit between the restriction and the problem, and inquiring into less restrictive alternatives—resembles the constitutional standard applied to equal protection or due process claims (although it is more searching than the rationality review currently applied to licensing restrictions.) But it can also be understood as a framework for the balancing called for by traditional rule of reason. Under the first two prongs, a court places the benefits on the "pro-competitive" side of the scale. Under the last prong, the court places the restriction's competitive burden on the "anticompetitive" side of the scale, asking if there is a way less destructive to competition to achieve the same benefits claimed for the restriction.

Some specific examples will illustrate the kinds of arguments that will be persuasive to a court analyzing a state board's restriction under the rule of reason. Louisiana's rule forbidding casket sales by anyone other than a licensed funeral director would fail the first prong of the test. There is no empirical evidence that, in states without such a restriction, caskets are of poor quality or that consumers are unable to determine the value of a casket. Further, the state would have difficulty raising even a theoretical argument that inferior quality caskets present a public health and safety issue since it does not even require burial by casket at all. Nor could it easily argue that the free market for caskets would suffer from information asymmetries given that, in states where retail casket sales are legal, one can comparison shop for them on websites like Amazon where one finds consumer reviews, detailed specifications, and photos. The restriction fails the first prong because there is no significant market failure—in practice or theory—that the restriction is designed to address.

Restrictions on the practice of nurse practitioners would fail the same prong, but not because there are no theoretical failures in an unregulated market for medicine. In theory, low-quality healthcare creates externalities when the cost of fixing (or living with) bad outcomes falls on other individuals or the government. This is almost certainly the case in our system, where the effects of poor care are felt everywhere from emergency rooms and inner-city clinics, to schools and the workplace. But although the state could make out a good theoretical argument that any given regulation on a nurse's right to practice improves quality and therefore addresses a market failure, there is no empirical evidence that supervised nurses have better outcomes unsupervised ones. Licensing restrictions that limit a nurse's ability to perform these tasks unsupervised would fail the first prong because there is no available data suggesting that such restrictions improve the quality of care.

State cosmetology boards' attempts to bring African hair braiding under their jurisdiction would fail the second prong of the analysis. Whatever health and safety issues arise from the unlicensed practice of braiding, they are not addressed by requiring practitioners to attend up to 1,800 hours of schooling on use of chemicals,

dyes, and other beauty techniques that do not relate to African braiding. There is simply a poor fit between the restriction and the problem that it purportedly addresses. Similarly, a state restriction requiring a cosmetology license for brow threaders would fail the second prong, as would requiring a degree in veterinary medicine for horse teeth floaters, when veterinary school teaches nothing about the practice.[242]

If the restriction survives the first two prongs, the court will balance the benefit of the restriction against its cost to competition. For example, some regulation of horse teeth floating may be justifiable since horse owners may not be able to evaluate the quality of a floater's service. But making teeth floaters attend veterinary school is an outsized requirement. Perhaps the state could justify a less restrictive licensing requirement, specific to horse teeth floaters, that mandates a short educational unit followed by a test narrowly tailored to assessing competency in teeth floating.

In balancing the anticompetitive effects of the restriction, courts should also consider other governmental regulation less restrictive than licensing. For example, labor economists hail certification as a superior option to licensing where a free market may suffer from information asymmetry.[243] Certification is similar to licensing in that the state sets educational or testing criteria for professionals, and passing these hurdles affords the professional a certification from the state that signals minimum quality and competency to consumers. But unlike under licensing schemes, uncertified practitioners may still practice, as long as they do not claim the title of "certified." Certification thus solves the information asymmetry problem, since consumers seeking high quality service can pay more for service from certified practitioners. But it does so at a lower cost to competition, since certification is not an absolute barrier to entry for low-cost practitioners. Louisiana's restriction on unlicensed flower arranging would likely fail this test, since at best the market failure in the flower industry is information asymmetry, not externalities, and so could be easily addressed by offering state certification programs to florists hoping to attract the most discerning customers.

2. The Parties: Standing to Sue and Available Damages

Changing the state action regime for licensing boards raises several logistical questions: Who would sue? And what would be the remedy? Would board members pay damages? As a descriptive matter, the answer is relatively easy: lifting state action immunity for state boards means that the parties who sue and are

---

[242] *See* Institute for Justice, *Challenging Barriers To Economic Opportunity: Challenging Minnesota's Occupational Licensing Of Horse Teeth Floaters, available at* http://www.ij.org/minnesota-horse-teeth-floating-background#_ftn1.

[243] Michael Pertschuk, *Needs and Licenses, in* OCCUPATIONAL LICENSURE AND REGULATION 343, 347 (Simon Rottenberg ed., 1980); KLEINER, *supra* note 3, at 152-57.

sued would be the same as in a run-of-the-mill §1 case.[244] Government enforcement agencies (such as the DOJ and the FTC) as well as private individuals capable of proving antitrust injury could bring suit against the conspirators, in this case members of an industry serving on a board, seeking equitable and monetary relief. But this raises an important normative question: Does this regime assign incentives to ensure optimal enforcement of antitrust norms? This sub-section argues that, for the most part, it does.

Since local state interests are often furthered by anticompetitive licensing restrictions, federal enforcement will be essential to policing self-dealing. The FTC and the DOJ will be able to bring suits arguing that a given licensing regulation violates the Sherman Act. They will be able to seek equitable relief under Sherman Act §4 and Clayton Act §15 to invalidate an anticompetitive regulation and prevent a board from implementing it. Federal agencies will bring the knowledge, expertise and resources for empirical investigation necessary to identify anti-competitive targets.[245]

Despite their many similarities, licensing boards and private cartels should be viewed differently by criminal law enforcement. Just as the potential benefits of licensing make *per se* condemnation inappropriate, they should also preclude criminal prosecution. State licensing board activity, while full of anticompetitive potential, is hardly among the "hard core" violations that serve as the primary target for criminal enforcement.

Public enforcement, while essential to effective enforcement of Sherman Act policy, may not be insufficient by itself. Lifting the state action ban on suits against boards will also allow private individuals capable of showing antitrust injury to bring suit. These plaintiffs, like other antitrust plaintiffs, can be divided into two categories: consumers and competitors. Although consumers of a professional service may not individually have enough financial incentive to bring a suit, they could use the class action vehicle, as is common in other areas of antitrust enforcement, to aggregate damages to a litigable amount. And Clayton Act §4, of course, provides plaintiffs with treble damages, thereby strengthening their incentive to sue.

Similarly competitors, most likely would-be professionals, could sue to receive three times the wages they would have earned but for the anticompetitive barrier to entry. These wages may be difficult to prove, but not necessarily more difficult to prove than lost earnings caused by cartel activity. Would-be professionals could also use the Sherman Act as a shield rather than a sword. Lifting immunity would mean that professionals could invoke the invalidity of a

---

[244] Of course, under the 11th Amendment, federal courts could not entertain suits against the boards as "arms" of the state. But under *Ex Parte Young*, the individual board members could be sued in federal court. *See* Earles v. State Bd. Of Certified Pub. Accountants, 139 F.3d 1033 (5th Cir. 1998).

[245] In fact, even without the added incentive that the power to bring suits provides, the FTC has invested in numerous studies of the economic impact of professional regulation. *See, e.g.*, COX & FOSTER, *supra* note 16; LIANG & OGUR, *supra* note 56. As discussed in Part II, the economics of professional licensing can be complicated, and the DOJ and FTC have access to the necessary data and expertise to properly analyze it.

board's regulation under the Sherman Act as a defense to an enforcement action against them.[246]

If lifting state action immunity would allow competitors and consumers to sue for monetary damages, who would pay? In cartel cases, the industry members who conspire must financially compensate their victims. So, too, in licensing board suits: the industry members on the board will be liable for treble damages to competitors and consumers harmed by their agreement.[247] This is the result that obtains under current law when courts deny professional associations state action immunity; *Goldfarb v. Virginia* is an example.[248]

Individual financial liability for board members may seem like an unjust or at least workable regime, but similar liability is imposed on individual state actors for violations of constitutional rights under Section 1983. States have responded to the prospect of financial ruin for their employees by indemnifying them against 1983 suits as a term of their employment.[249] With the deeper pockets of the government available, victims have a meaningful opportunity for compensation. And although individual employees are not personally liable, the indemnification structure gives states the incentive to train and tightly control employee conduct and create disciplinary systems to deter violations. So, too might states chose to indemnify individual board members in case of a treble damages suit under the Sherman Act.

3. The Defense: Boards as Single Entities?

Board activity easily fulfills §1's requirement of agreement, since board members meet face-to-face and explicitly agree on licensing restrictions, often by formal majority vote. And these agreements are among competitors; licensing boards often have only nominal representation from non-professionals. Boards may argue, however, that their rules and restrictions are not the product of a conspiracy, since as a board they operate as a single entity. Conspiring with others on the board, so the argument would go, is like conspiring with one's self.

This argument is likely to fail. The Supreme Court has held that professional associations, similar to boards in composition and incentives, are conspiracies under §1. Recently, the Supreme Court rejected the National Football League's argument that individual teams could not conspire since together they were a single

---

[246] The Supreme Court used state action to reject just such a defense in *Bates*, 433 U.S. 350 (1977), where lawyers, advertising their services in contravention of the bar's rules, argued that the rule was invalid under the Sherman Act. But in a regime where state licensing boards could not invoke state action immunity, such a defense to board enforcement would be available.

[247] Page & Lopatka, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269, 292 (2003) ("[A]ny hybrid restraint that violates the antitrust laws and fails the test for immunity leaves private parties exposed to the whole panoply of antitrust remedies.").

[248] The plaintiffs, a class of consumers of legal services, sued the state bar association for treble damages for Sherman Act violations. The Supreme Court, in holding that the bar acted in contravention of state policy and so without adequate state delegation, remanded the case to allow the class to hold individual members of the bar liable for treble damages. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[249] In the case of law enforcement, the state or local government that employs the officer typically promises to indemnify police officers in the case of a 1983 suit.

entity that had a united economic incentive to maximize joint profits from licensing team merchandise and ticket sales. The Court held that the teams, absent the agreement, would have had individual profit incentives to compete with one another, so the agreement "deprives the marketplace of independent centers of decisionmaking"[250] in violation of §1. To the extent that there was a unitary financial goal among the teams it was to suppress competition among themselves.[251]

Although the Supreme Court has not considered whether a state licensing board is a single entity under §1, the FTC has on several occasions rejected this defense to Sherman Act liability. In *Massachusetts Board of Registration in Optometry v. FTC*,[252] the FTC explained that the optometry board, in passing restrictions on advertising, was not acting as a single entity: "Each optometrist on the Board is principally engaged in the private practice of optometry in the market that the Board regulates. ... [I]n the absence of those regulations, the Board optometrists would compete with each other by individually deciding whether to advertise."[253] Similarly, federal courts and the Supreme Court have held that private professional organizations, in promulgating standards of practice, certification, and licensing, cannot claim to be acting as a single entity under the antitrust laws.[254]

B. Possible State Responses and Their Likely Effects

Applying Sherman Act pressure to state licensing boards will alter the equilibrium of a complex system of regulation, so a thorough analysis of its benefits must consider how that system will likely adjust. As this section illustrates, states wishing to regulate the professions without having to answer to an antitrust suit will have several options. But each option will require a departure from the current practice of using practitioner-dominated administrative boards to promulgate rules and regulations, and thus a step towards politically accountable, procompetitive regulation.

---

[250] Am. Needle, Inc. v. Nat'l Football League, 130 S.Ct. 2201, 2212 (2010) 2212.

[251] *Id.*, at 2213 ("[I]llegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties.").

[252] 110 F.T.C. 549 (1988).

[253] *Id.* at 43. Likewise, after the NFL case, the FTC held that the single entity defense was not available to the North Carolina Board of Dental Examiners for the same reason. The FTC explained that since "board members had a personal financial interest in excluding non-dentist teeth whitening services," it could not be said to be acting to further a financial goal independent of those of the individual members. In the Matter of The North Carolina Board of Dental Examiners, 2011 WL 6229615 at *20 (F.T.C. 2011).

[254] See *Daniel v. American Board of Emergency Medicine* 802 F.Supp. 912 (W.D.N.Y. 1992) (holding that private certification association can be a §1 conspiracy).

1. Actively Supervising Board Activity

If the Court requires occupational boards to show supervision in order to enjoy immunity from antitrust suit, then the most straightforward way for states to insulate boards from antitrust scrutiny is to actively supervise them. Supervision, at least in theory, will complete the link between a board's anticompetitive restrictions and the accountable, elected body that demanded them.[255] Formal review and approval by the state will afford consumers and would-be professionals a stronger voice against heavy-handed restrictions since they could vote out officials approving of unjustifiable regulation.

The political process is never perfect and consumer interests will probably always be more diffuse that those of current practitioners, but forcing states to answer for and stand behind a board's restriction on entry and practice exposes these decisions to at least the minimum political accountability that antitrust federalism demands. As the Court explained in *Ticor*, "[f]or States which do choose to displace the free market with regulation... insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it is has sanctioned and undertaken to control."[256]

2. Changing Board Composition

Another way in which a state could protect a licensing board from antitrust scrutiny would be to change its composition. As discussed in Part IV.B.3., *supra*, meeting the conspiracy requirement of §1 depends on there being at least two members of a profession on the board. A state could create a kind of safe-harbor for its professional licensing boards by appointing only one professional member to its ranks, and filling out the rest of the board with members representing other interests. Having a diverse membership that includes consumers, civil servants, labor economists, and members from adjoining professions may serve as a prophylactic against liability since such a board's decisions are likely to have considered and resolved the concerns raised by a Sherman Act suit.

3. Moving Licensing to the Interior of State Government

States may, however, find that altering board membership to avoid suit is unattractive since the only way to guaranty immunity is to cut down professional participation to token levels or to implement costly mechanisms for supervision. An alternative would be to do more regulation directly through the sovereign branches of the state itself. Even under the current regime, some professional entry and practice requirements are passed as state statutes, and these acts of sovereign

---

[255] *See, e.g.*, Inman & Rubinfeld, *supra* note 214, at 1257 (1997) (concluding that the second *Midcal* prong (requiring state supervision) "gives meaning to the first, for without supervision, interested individuals cannot be assured that their initial participation in the political process will be meaningful."); *but see* Havighurst, *supra* note 39,, at 599 (disagreeing with the federal antitrust agencies apparent belief that "giving greater weight to the supervision requirement is the best way to discourage state licensing and regulatory boards from acting in anticompetitive ways").

[256] *Ticor*, 504 U.S. at 635.

authority are always immune under *Parker*.[257] Such decisions would not be subject to antitrust scrutiny, even under the change proposed in this Article.

This change, like adding meaningful state supervision over board activity, would benefit competition by deterring regulation that benefits only practitioners. Elected officials would be made to answer for and stand behind decisions restricting entry and practice. Restrictions would be proposed and debated openly in the legislature, allowing for more participation from the constituents that are currently absent from professional licensing boardrooms.

Even direct regulation through legislation does not preclude the influence of combinations of private competitors. State legislatures are free, and would also be under our proposed change, to elicit proposals for restrictions from private professional associations. This creates a risk that states will effectively hand over regulatory power to groups like the AMA or the ABA and give collusive private arrangements a rubber stamp in the legislature. Under Supreme Court precedent, these rubber stamps, as sovereign acts, enjoy antitrust immunity.[258]

Parker itself offers a back-stop to these abuses. Where the state delegates rulemaking to a private organization, that organization is subject to *Midcal*'s two-step. As the Court said in *Parker*, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it."[259] Thus in *Goldfarb*, the Court held that the state bar association needed to prove its compliance with state policy in order to enjoy immunity.[260] Further, the legislature's rubber stamp itself will be subjected to political pressures. The electorate may recognize that legislatures lack the expertise to create efficient professional regulation without consulting members of the profession itself. But that does not imply that a mere rubber-stamp of a profession's self-dealing will pass political muster. Requiring that the state place its imprimatur on regulation is at least better than the status quo in which a state may delegate self-regulation to professionals and walk away.

V. CONCLUSION

Licensed occupations have for too long been free to act like cartels while immune from Sherman Act scrutiny. With nearly a third of workers subject to licensing, and the trend upward, it is time for a remedy. We do not propose an end to licensing or a return to a Dickensian world of charlatan healers and self-trained dentists. But the risks of unregulated professional practice cannot be used to

---

[257] Hoover v. Ronwin, 466 U.S. at 567—68 ("[U]nder the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the State, and *ipso facto* are exempt from the operation of the antitrust laws....[A] state supreme court, when acting in a legislative capacity, occupies the same position of that of the state legislature.").

[258] *See Bates*, 433 U.S. at 359.

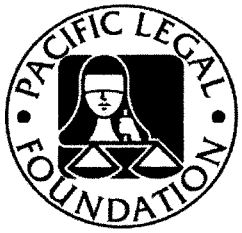
[259] *Id.* at 341.

[260] *Goldfarb*, 421 U.S. at 790. *Goldfarb* predated *Midcal*, and so did not discuss the supervision prong articulated in that case.

rationalize unfettered self-regulation by the professionals themselves. A balance needs to be struck.

That balance is the same one sought in any modern rule of reason case: a balance between a restriction's salutary effects on the market and its harm to competition. Immunity from the Sherman Act on state action grounds is not justified under any theory of antitrust federalism when those doing the regulation are the competitors themselves, where they are not accountable to the body politic, where they have abused the privilege, and where the anticompetitive dangers are so clear. The threat of Sherman Act liability can provide the necessary incentives to occupational regulators engaged in trading off competition for public safety and welfare. Without it, self-dealing occupational boards will continue to be cartels by another name.

Appendix C



"'Public Convenience And Necessity' And Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry"

by Timothy Sandefur

Draft: May 26, 2013
Subject to Revision

Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111

www.pacificlegal.org

Introduction

Starting a business is expensive and time-consuming. Accumulating capital, hiring talent, buying insurance, doing market research—all these tasks and more make opening a small business among the hardest things a person can ever attempt. Yet people surmount these obstacles because the rewards of business ownership can be enormous.[1] Economic independence and opportunity are central components of the American dream, deeply embedded in our nation's history and tradition.[2] The Supreme Court has made clear that the right to engage in a trade or profession is one of the "libert[ies]" protected by the Constitution, and that states may restrict that liberty only so far as necessary to protect the public health and safety.[3]

Sadly, government often obstructs economic opportunity by imposing barriers to entry that bear little relationship to public health and safety. Occupational licensing requirements, for example, commonly force prospective business owners to undergo expensive and time-consuming educational and training requirements before they may legally practice a trade or profession.[4] While the Constitution requires that these restrictions be rationally related to a person's "fitness and capacity to practice" the trade or profession,[5] in practice they are frequently abused to protect established companies against competition from newcomers.[6]

Worse than occupational licensing laws, however, are laws that require a business to obtain a "certificate of public convenience and necessity" or "certificate of need" (CON) before beginning operations. Unlike occupational licensing laws, CON requirements do not purport to determine whether a person is educated, trained, or skilled before going into business. Instead, they are expressly aimed at preventing competition against established companies, regardless of quality or skill.[7] Devised in the late nineteenth century to regulate public utilities and natural monopolies, today they apply to a variety of industries—especially the taxicab industry and moving companies—where they have no economic justification. The consequence, as public choice theory would predict, is that existing firms exploit the power of CON requirements to prevent competition, drive up the cost of living to consumers, and deprive entrepreneurs of their constitutionally guaranteed right to economic liberty.

In this article, I will address the economic and constitutional problems raised when CON requirements are applied to normal, competitive markets. I will focus on a recently abolished CON requirement for moving companies in Missouri.[8] My recent litigation challenging the constitutionality of that statute[9] provides a particularly revealing case study of the abuse of government regulation for private ends, rather than for public welfare. In Part I of this article, I explore the history of CON laws and their application to the moving industry as well as the state of the law regarding their

constitutionality. In Part II, I discuss the Missouri law, as a case study of how established industries exploited the power of these laws to bar legitimate competition. In Part III, I discuss what the Missouri case, which is typical of the rent-seeking dynamics at work in CON regimes can teach us about the application of rational basis scrutiny to cases involving the right to earn a living. In Part IV, I conclude that CON laws, at least when applied to competitive, non-public utility markets, are unconstitutional.

I. CON Laws

A. How CON Laws Work

The "certificate of public convenience and necessity" or "certificate of need" requirement is a type of prior restraint applied to businesses other than the press.[10] A typical CON law forbids any person from engaging in a specified trade without first obtaining a certificate, and establishes, or allows an administrative agency to establish, the procedure for obtaining that certificate.[11] Ordinarily the applicant must fill out some forms describing the service to be provided, the equipment the applicant will use, the applicant's experience, and other details.[12] The applicant must also prove that he or she meets the insurance requirements specified in the statute, and that he or she is familiar with and promises to obey the applicable safety standards and price regulations.[13]

After the application is filed and deemed complete, the agency notifies the existing certificate holders that a person has applied for a new certificate, and gives the existing firms—the opportunity to file objections against the granting of a new certificate.[14] This essentially means that existing firms can veto, or at least significantly burden, their own potential competitors; although, in theory, other members of the public can also object, it appears that this virtually never happens. Objections are usually informal: the existing firm is required only to recite certain statutory language, and is not required to submit legally admissible evidence or sign under penalty of perjury. (A typical example of such an objection appears in Appendix A.) Once such an objection is filed, the agency must typically schedule a hearing to decide whether to grant the certificate. Some CON requirements allow the agency to dispense with a hearing if no application is filed, but others require a hearing in every instance.[15]

At the hearing, the applicant must prove that there is a "public need" for the proposed new service--or some standard to that effect—in order to be allowed to operate. The statute typically does not specify what kind of evidence is required, or what standard of review is applied, or if it does so, it articulates these factors in extremely broad and vague terms.[16] As a result, administrative agencies enjoy nearly unlimited discretion to interpret "public need" (or whatever similar terminology is used) however they wish.[17] They may also take a great deal of time to make their

decisions. Such delay can be very costly to an applicant. So, too, can the cost of legal representation, since the laws of many states require any business organized as a corporation to be represented by an attorney at any administrative hearing; the owner may not represent the corporation herself.[18]

Kentucky is a representative example. That state requires that all movers of household goods obtain a Certificate from the state's Transportation Cabinet Division of Motor Carriers.[19] Operating without a Certificate is a misdemeanor for which the punishment is a fine between $2,000 and $3,500.[20] But when a person applies for a Certificate, the Division notifies existing Certificate holders, giving them the opportunity to file a "protest" against the granting of the application.[21] If a protest is filed, the Division is required to convene an administrative hearing to decide whether or not to grant the Certificate. If no protest is filed, the Division may choose to waive the hearing requirement.

The standards for issuing a Certificate are as follows: the applicant must be

> [1] fit, willing, and able properly to perform the service proposed and to conform to the [statutes regulating the practices of moving companies] and the requirements, [rules and] regulations of the [Division of Motor Carriers], and [2] further that the existing transportation service is inadequate, and [3] that the proposed service...is or will be required by the present or future public convenience and necessity, and [4] that the proposed operation, to the extent authorized by the certificate, will be consistent with the public interest and the transportation policy declared in this chapter.[22]

No statute, regulation, or case law defines the terms "inadequate," or "present or future public convenience and necessity," or explains what types of service are "consistent with the public interest."[23] This lack of definition is a common feature of CON restrictions.[24]

State regulations require any person filing a protest to state the grounds for that protest,[25] but there is no requirement that the protest be sworn, or notarized, or contain admissible evidence of any sort; nor does any rule specify which grounds are or are not a proper basis for invoking the hearing procedure. At the hearing, an applicant organized as a corporation must be represented by an attorney.[26] The applicant bears the burden of proof. If he or she cannot prove that existing services are inadequate, or that future public necessity will require the new service, then the application must be denied.[27] Although considerations of public health and safety factor into the assessment of whether the applicant is "fit, willing, and able properly to perform the service," the other provisions of the statute—regarding "public convenience and necessity" and the "public interest"—are undefined and implicitly encourage discriminatory and

protectionist regulation. That favoritism is explicit in the "adequacy" element, which requires the Division to presume against allowing new firms to enter the market, and to deny licenses even to fully qualified applicants simply because they would compete against existing firms.[28] But even aside from the statutory and regulatory text and the substantial risk that a fully qualified applicant will be rejected, the process itself serves as an effective barrier to entry, since by merely submitting a "protest"—even one which makes no admissible evidentiary claims—an existing firm can force a prospective competitor to undergo an expensive and time-consuming hearing process. This procedural hurdle is often enough to block qualified and conscientious entrepreneurs from entering the market.

B. CON Laws: Public Benefit or Rent-Seeking Bonanza?

CON laws originated in the late nineteenth century, primarily to regulate railroads.[29] In the leading article on the history of CON laws, William Jones identifies the following rationales advanced for such laws: they would promote economic efficiency by preventing "wasteful duplication" of services available in the market; bar "excessive competition"; prevent "cream-skimming"—*i.e.*, the economic incentive to avoid the economically inefficient practices that regulated firms are often required to engage in; protect private investments in public utilities; and protect against environmental damage, the shutting down of desirable public services, or other perceived costs of increased competition.[30] Experience, however, demonstrates that these economic arguments for CON restrictions are either unpersuasive or obsolete, and that the persistence of such regulations is better explained by the rent-seeking behavior predicted by public choice theory.

The first two arguments reflected fashionable economic theories of the time which held that economic competition was wasteful and destructive.[31] The notion of "wasteful" competition held that if, for example, multiple rail lines were established between the same cities, this represented a waste of resources, since only one rail line was necessary.[32] Competition was also seen as destructive because it would drive prices down, progressively forcing firms to cut services and quality in order to stay afloat, and eventually driving profits down to such a degree that the businesses would go bankrupt.[33] These theories were never very plausible. Free competition tends toward efficiency precisely because nobody can know *a priori* whether one railway line or two or more are "needed" between the two cities; this can be determined only by trying it out and seeing how supply and demand function. If, in fact, there is only sufficient demand for one railroad line, the second line will be unable to meet its costs and will go out of business. To call this "wasteful" is to ignore the role that market competition plays in discovering consumer preferences and in the creation and innovation of ways to meet consumer demand.[34] Moreover, the alternative—in which

central planners are charged with the authority of determining what sorts of products or services are "really needed" in a market—would certainly be far less efficient than competition, subject to insoluble problems of knowledge[35] and the perverse incentives we call "rent seeking."[36] Contrary to the charge of "destructiveness," competition is creative precisely because it allows market participants to grope forward to discover what consumers and producers really want, and strives to meet those ever-changing demands in ways that no alternative could ever match.[37] This process is better described as "creative destruction," a dynamic process that disciplines firms and ensures that they meet consumer demand in order to flourish.[38]

The next two rationales for CON laws—preventing "cream-skimming" and protecting private investment in public services—apply only to public utilities. "Cream-skimming" occurs when a business seeks an advantage over its regulated competitors by discarding inefficient business practices that its competitors are forced to comply with. For example, if the government requires a railroad to serve a small, out-of-the-way town at an economic loss, a competing railroad might "skim the cream" by providing service only on those routes that are profitable. The CON law regime would help prevent this by strengthening the regulatory agency's power to compel all railroads to serve the small, out-of-the-way town. Note that this theory contradicts the earlier theory that CON laws would promote economic efficiency; the "cream-skimming" rationale is that CON laws will restrict the competitive pressures that move toward efficiency. Note also that the "cream" is there for the skimming only because the existing firms are legally forced to engage in economically inefficient behavior in the first place.[39] That the market would encourage others to "skim the cream" should be regarded as an example of the strength of markets to resist the inefficiency of such mandates. "Often what is characterized as 'cream skimming' by an incumbent monopolist is really a sign that, because of technological change, the market is becoming competitive."[40]

Protecting private investment in public utilities is a more substantive argument, but in the years since CON laws were devised, its relevance has diminished. During the latter decades of the nineteenth century, public utility services were often provided by private contractors acting under some form of government charter. By giving these licensees a near monopoly, CON laws were thought to encourage private investment in the construction and operation of utilities, similar to the way patents are said to create incentives for innovation. But one of the primary reform goals of the Progressive Era was to eliminate the favoritism and graft that resulted from this scheme by replacing it with a civil service system under which government owned and operated public utilities directly, instead of outsourcing these services to favored private corporations.[41] The shift to government ownership and away from the franchise model largely, though not entirely, mooted the importance of guaranteeing private investment in public utilities. Fewer private investors needed the promise of a near-monopoly provided by

the CON law system, because the utilities which the private investors previously financed were now financed with tax dollars and built by government employees. Of course, in the moving industry, this concern is generally beside the point, since in today's world, private household goods movers do not seriously compete with public utilities like railroads, and since the government does not operate its own moving companies, or issue franchises for moving companies. Nowadays, moving companies are ordinary private businesses in a competitive market.

Even where these concerns are not rendered moot, one must keep in mind that implementing a CON law regime has costs. By deterring competitors from offering more economically efficient alternatives, CON restrictions can deprive the public of just the sort of information it most needs: evidence that there are cheaper and better ways of providing the service than the permitted utility service is providing. Blocking competition may encourage investment in the public utility—but it simultaneously discourages others who might have better ideas from trying to participate. One recent example can be found in the rise of "ride-sharing" enterprises in cities throughout the world, which use smart-phone technology to substitute for traditional taxicab services. Businesses like Uber[42] allow consumers to hire drivers and to pay them remotely through their cellular phones, instead of hailing a taxicab. The service is fast, inexpensive, and offers both riders and drivers a wider array of choices. For precisely these reasons, incumbent taxicab services have filed lawsuits against Uber, alleging among other things that the firm is operating an unlicensed taxicab operation.[43]

Whatever the merits of the "cream-skimming" and incentive rationales, they apply only to public utilities, or perhaps to markets that feature some kind of monopoly characteristics.[44] They do not apply to private markets with healthy competition. In these, "cream-skimming" is simply the ordinary competitive process on which the economy depends for innovation and growth, and encouraging investment where market demand is lacking is rightly seen as foolhardy.

Finally, CON laws were seen as a means of preventing harmful externalities, such as environmental pollution or the shutting down of complimentary or competitive businesses in consequence of competition. Here, too, the CON regime makes sense, if at all, only in the realm of public utilities. In ordinary competitive markets, there is no sense in protecting competitive or complimentary businesses from the consequences of legitimate competition, since that only raises costs to consumer, stifles innovation, and rewards the inefficient while punishing the efficient. Preventing environmental harm may be a worthwhile endeavor, but it is far more sensible to accomplish this through ordinary regulations, pollution controls, nuisance lawsuits, inspections, and the like, than through barring a business from the market—regardless of its quality—simply because public officials believe there are already "enough" such companies.

Restricting the number of firms that may operate in a market on the basis of such bureaucratic calculations of efficiency is impossible, and attempting it is dangerous. It

is not possible for a government agent to determine whether or not the general public "needs" a new business of the sort in question. To measure, let alone to predict, public need in this way would require a mountain of information that even private industry, with all its sophisticated tools for measuring consumer preferences and desires, does not have. Private industry has enormous incentives to measure and anticipate consumer preferences, and yet it frequently gets such questions wrong.[45] To expect a government entity—which has no such incentive to get the question right, and often has fewer resources to measure and anticipate future consumer needs—is nothing short of delusional. It is even more absurd to expect a government entity to determine what the public will deem "convenient," in addition to "necessary." While necessity might conceivably be reduced to some quantitative value that a bureaucratic agency could measure, convenience is a far more complicated and individualistic matter. It is rarely possible for a person to know what is "convenient" even for himself, let alone for another person. It would not have been possible for a government agency to determine whether cell phones or hybrid cars are "convenient" for the general public, let alone whether Starbucks coffee shops or gourmet cupcake stores are "convenient." Yet they evidently are—witness their economic success. This is but a variation on the "knowledge problem" articulated by Friedrich Hayek: to coordinate the economy from the top down, the government would need to have access to a virtually infinite amount of information, which cannot be effectively marshaled by any single mind or agency, in part because that information is often not even known to the consumers themselves.

But it is not only foolhardy to expect the government to determine whether a prospective business is "convenient" and "necessary" for the general public, it is also dangerous to make the attempt. Because CON laws are barriers to entry, creating an artificial shortage of the services at issue, existing license-holders are able to charge above market rates. A license is accordingly valuable, sometimes to an extreme. In New York City, for example, a medallion that allows a person to operate a single taxicab was recently sold for over $1 million.[46]

Public choice theory would predict that because a certificate to operate is worth so much money, it becomes subject to the pressures of rent-seeking. Established firms seek to use the government to prevent competition and to protect their "turf" against new competitors. Such efforts will often be disguised as protections for public health and safety—as Sir Edward Coke remarked of a similar regulatory scheme over four centuries ago, those who advocate such laws "look one way and row another; pretend public benefit, intend private."[47] This is slightly unfair, since many of the existing firms that demand stronger barriers to entry genuinely believe that such barriers will help protect the general public. Ensuring, for instance, that florists have a college degree likely will have some non-zero effect in preventing harm to the public. But it will have that effect only at the cost of depriving the public of services of those who do not qualify under the rule, thus encouraging stagnation and "political entrepreneurship"—

i.e., the diversion of economic resources to political lobbying and away from productivity and innovation.

As a license to operate a business becomes more rare and harder to get, and its value accordingly increases, firms will invest greater amounts of time and money in the effort to obtain (or block) such licenses. The result is less availability of services, lower quality services, higher prices, and less economic opportunity. Public choice theory would predict that a CON regime would lead to these results, instead of the greater efficiency and protection of public enterprises predicted by the older theories on which CON laws were designed. Public choice theory would also predict that as economic and technological circumstances change, CON laws would nevertheless remain on the books—vigorously defended by incumbent firms—long after the economic rationales on which they were based were rendered obsolete even on their own terms. As Judge Posner has written, CON laws

> are worse than superfluous; they constitute a barrier to entry that may perpetuate monopoly long after a market has ceased to be naturally monopolistic. A firm that reckons that cost conditions are now favorable to entry must convince a government agency of the fact. That will require a formal submission, substantial legal and related expenses, and a delay often of years—all before the firm may commence operations. The costs and delay are alone enough to discourage many a prospective entrant. Much more is involved than running a procedural gauntlet, however, for ultimate success is by no means certain. The favor with which regulatory agencies look upon entry varies with the agency and the period, but the predominant inclination has been negative; there is now a good deal of evidence that the certificating power has been used to limit greatly the growth of competition in the regulated industries.[48]

In a field like the moving industry, which features relatively low start-up costs and would otherwise make a prime opportunity for unskilled or inexperienced workers, or workers with few language skills or other obstacles to advancement, the consequences can be particularly inhumane: obstructing economic opportunity for precisely those people who need it most.

Another common justification for CON regimes is that allowing existing firms to participate in the process for determining whether an applicant should be granted a Certificate helps to harness the existing firms' knowledge regarding the applicant. Since officials may not be as familiar with the applicant's business, or with economic factors relevant to the application, the opportunity to challenge an applicant gives experiences businesses the chance to provide the agency with necessary information.[49] But this argument is implausible, given the strong incentives that existing firms have to

block potential competition for self-interested reasons rather than to participate in a disinterested fashion as a guardian of the public interest. The fact that CON restrictions operate as an anti-competitive restraint on trade rather than as a means for harnessing relevant information for a public-spirited assessment of an applicant's fitness is shown by the fact that existing firms are usually not required to prove or even allege any danger to the public in order to object to the granting of an application; indeed, such objections typically need not be signed under penalty of perjury, or contain any legally admissible evidence or allegations whatsoever. Further, CON restrictions generally bar consumers from participating in the proceedings, or at least make no provision by which they may do so,[50] which would make no sense if the process were aimed at obtaining relevant information. Finally, CON statutes often provide that competitive impact on an existing firm is sufficient cause for the denial of the application, even where the applicant is fully qualified and safe.[51]

It appears that nothing but an historical accident is responsible for the initial application of CON requirements to the modern moving industry. In the years following World War I, states and cities began using CON requirements to bar automobile-based taxicab and household goods movers from competition against trolley lines, again in an effort to protect private investment in the trolleys.[52] These laws generally lumped taxicabs and moving companies together, as "carriers of persons or property," apparently without considering whether the two industries presented the same competitive threat to existing trolley companies.

As trolleys vanished from the scene in the latter half of the twentieth century, the CON laws remained in place, partly out of inertia, but also because by that time, they had gained an economic constituency in the form of existing licensees with an economic incentive to bar competition. As a result, the moving industry—which was never a public utility; which had none of the economic features that characterize a utility or a monopoly; which had low start-up costs and was no greater threat to the environment or the public welfare than any other fully competitive industry—found itself under a regulatory regime designed for a pre-Civil Service era of railroads and streetcars, and which even on its own terms made sense only with regard to transportation of persons and not property. Worse, it found itself subject to an anti-competitive legal regime that allows existing firms to exert monopoly powers in an industry that otherwise would be an ideal entry-level job for unskilled workers. If it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,"[53] surely it is more revolting to have a rule of law based on economic fallacies, designed for a world that is now long gone, and for a different industry entirely, and which, "[i]nstead of protecting consumers...increases and sustains the power of regulated private entities to influence the pricing, output, and allocative decisions of the intrastate motor carrier market."[54]

II. Missouri's Mover CON Law: A Case Study in Rent-Seeking

Public choice theory predicts that where the government can redistribute wealth or opportunities between private groups, those groups will invest their resources in obtaining favorable legislation that will benefit them or handicap their rivals. Entry restrictions like occupational licenses or CON laws are made-to-order examples. Licensed insiders seek to block competition and to create an artificial scarcity that raises the prices insiders can charge. Public choice theory would predict that under a CON regime, existing firms will engage in rent-seeking behavior such as spending resources on policing rivals instead of improving service and lowering costs, or seeking to make Certificates more difficult or expensive to obtain. They will also try to "capture" the regulatory agency charged with enforcing the restriction, which likely would include exploiting vague statutory language that would expand regulators' power to bar entrants.[55]

In 2010, I filed a lawsuit challenging the constitutionality of Missouri's CON law on behalf of a St. Louis entrepreneur named Michael Munie, and his firm, ABC Quality Moving, Inc.[56] The evidence revealed in that case provides a particularly stark vindication of these predictions.

The Missouri CON law was typical of those found in most states, with a few interesting differences.[57] It prohibited any person from operating a moving service without first obtaining a Certificate from the Motor Carrier Services Division of the Department of Transportation (Division).[58] The statute set forth the following criteria for obtaining a Certificate:

> (1) the applicant must be "fit, willing and able to properly perform the service proposed, and to conform to the [law]"
>
> (2) the proposed company would "serve a useful present or future public purpose," and,
>
> (3) if anyone files an objection to the issuance of a Certificate, the application would be denied if the objector showed "that the transportation to be authorized by the certificate will be inconsistent with the public convenience and necessity."[59]

The statute provided further that whenever an existing firm objected to the issuance of a Certificate, the Division must consider "the diversion of revenue or traffic from existing carriers"[60] when deciding whether the applicant met the criteria for a certificate.

The first thing to notice about these rules is how vague they are. While "fit, willing and able" is relatively objective—and is a common element of CON statutes—the terms "useful present or future public purpose" and "public convenience and necessity" were left undefined.[61] No law, regulation, judicial opinion, employee handbook, or other authority in Missouri provided any definition or explanation of these terms. Indeed, the term "useful present or future public purpose" was unique to this statute, and was not to be found in the law of any other jurisdiction. The statute therefore failed to address what sorts of purposes were "useful" or not, or how the agency would determine "future" as opposed to present purposes.

The process of obtaining a Certificate began when a person submitted an application, called an MO-1 application, which requested information about the applicant's finances, experience, and insurance, as well as the geographical areas in which the applicant sought to provide service. Employees of the Division would first review the application to ensure it was complete.[62] Division staff would then review the applicant's record to see if the person was insured, had safety infractions or a criminal background, and so forth. This determination would satisfy the first criterion above: the "fit, willing and able" test.[63]

The Division then required any applicant to provide "statements of support"—typically a written statement from a potential customer—which would declare that the customer would, if given the chance, hire the applicant to provide moving services.[64] The Division held that these "statements of support" would provide satisfactory evidence that the proposed moving company would "serve a useful present or future public purpose." But the Division did not require any particular number of statements in order to establish "usefulness." Nor did it investigate the truth of any of the claims made in such a "statement," or give greater credence to one kind of statement over another. For example, a statement from a reputable business owner would not be given more weight than a statement from an unknown neighbor.[65]

Upon concluding that the proposed moving service would serve a useful purpose, the Division was then required to publish a notice of the submitted application in a newsletter, called the *Notice Register*, which was distributed to the existing Certificate holders.[66] This notice informed the established moving companies about the application, including the geographical range in which the proposed service would operate, and invited them to file objections—called "interventions"—protesting the issuance of the Certificate.[67] According to the statute, an intervenor was required to specify "its interest" in the application, but not the grounds for objecting; nor were such interventions required to be sworn, notarized, or contain any legally admissible evidence.[68]

Upon the filing of an intervention, the statute mandated that a hearing be convened to determine whether to grant the applicant a CON.[69] This hearing was not conducted by the Division, but by the state's Administrative Hearing Commission

(AHC).[70] The Division would then forward the file to the AHC, which would review the matter *de novo*—allowing the AHC to consider fitness, usefulness, and convenience and necessity.[71] Missouri law required that any applicant that was incorporated must be represented at such a hearing by a licensed attorney.[72] At that hearing, the intervenor, rather than the applicant, bore the burden of proving that issuing a new CON would be inconsistent with the public convenience and necessity.[73] Yet the statute's specification that the hearing officer must consider "diversion of revenue or traffic from existing carriers"[74] when deciding a contested application implied that the existing firm need only demonstrate that a new company would draw business away from the intervenor in order to bar the application from being granted.

The filing of an intervention, therefore, signaled that the applicant for a CON was in for a costly and time-consuming delay. Not only would an applicant that was organized as a corporation be forced to hire a lawyer, but the average wait time for contested applications in 2011 was 154 days, with one applicant forced to wait 1,119 days—more than three years—before obtaining a CON.[75] And given the uncertainty caused by the vague statutory language governing the issuing of CONs, an applicant choosing to proceed through that route despite the costs faced a very significant risk of being denied a certificate in the end. As a result, applicants against whom interventions were filed virtually always chose to narrow their requests for authorization in order to induce existing firms to withdraw their interventions.

Between 2005 and 2010,[76] there were 76 applications[77] for CONs to operate moving companies in the state of Missouri.[78] These applications fell into two categories: 17 sought authority to operate statewide,[79] and all of these applicants were subjected to one or more interventions by existing firms, for a total of 106 interventions.[80] The other 59 sought authority to operate either within a "commercial zone" which was statutorily exempt from the intervention and hearing requirement[81]—such as within the cities of St. Louis, Kansas City, Columbia, among others—or within a small radius, or an isolated or rural geographical area, where they presented little competitive threat to existing firms.

All of the 106 objections were filed by existing moving companies that already had CONs.[82] An example of such an intervention is given in Appendix A. All 106 stated as the *sole* basis for intervention that allowing a new moving company would cause "diversion of traffic or revenue." None of the objections ever alleged any danger to public health, safety, or welfare, in the event that the application was granted, and none provided the government with information relating to public health or safety.[83] Nor were Division officials aware of a single case in which the AHC had rejected an application on the basis of public safety considerations.[84]

Given that the hearing procedure was expensive, time-consuming, and risky, most applicants chose to avoid a hearing whenever possible. In 14 of the 17 contested cases between 2005 and 2011, the applicant responded to the filing of interventions not by going through a hearing and demanding a certificate, but by withdrawing and

amending their applications to abandon their request for statewide moving authority and request instead permission to operate in a small, rural area or within a Commercial Zone exempt from the intervention and hearing procedure. And in every case in which an applicant chose to withdraw its statewide request, the intervenors withdrew their interventions and the requested CON was granted to the applicant. Obviously, if the intervenors had been concerned with public safety, they would not have withdrawn their objections simply because the applicant sought to operate in a smaller area rather than statewide.

For example, when Golden Valley Movers applied for statewide authority, nine Interventions were filed by existing moving firms; the Division referred the application to the AHC, but Golden Valley restrictively amended its application to only request authority to operate in Johnson, Pettis, Henry, Benton, and St. Clair Counties. The intervening companies then withdrew their Interventions "based upon the amendment of Applicant's request of authority to service to, from, and between [these] points."[85] When A Friend With A Truck Movers, LLC, sought authority to operate statewide, objections were filed by four existing moving companies, and the Division referred the application to the AHC. But when A Friend With A Truck Movers agreed to restrict the scope of its requested authority to operate only within the Kansas City Commercial Zone, the Intervenors were "satisf[ied]" and withdrew their objections.[86] This pattern was repeated in all but three cases in which an applicant sought statewide moving authority.[87] In 2010, Billy Holloway, Jr., of Salem, Missouri, filed an application for a CON for his business, Another Smooth Move, Inc., requesting authority to operate within a 75-mile radius of Salem. After a notice of his application was published in the *Notice Register*, three existing firms filed interventions to his application, all stating as the basis for intervention that his company would "divert traffic or revenue" from the intervenors. None stated that Another Smooth Move presented any danger to the public. When Another Smooth Move's attorney advised the company's owner that a hearing would be an expensive and slow undertaking, the owner amended the application to request only a 50-mile radius. The intervenors thereupon withdrew their objections, and the CON was granted.[88]

In only three cases did an applicant persist, after the receipt of interventions, in seeking authority to operate statewide. One of these later chose to withdraw its application and to seek instead authority to purchase an existing statewide CON from another moving company.[89] The intervenors responded to this by withdrawing their interventions, and the applicant was allowed to buy the existing certificate.[90] Only two—Daryl Gaines[91] and All Metro Movers[92]—chose to go through an administrative hearing to seek statewide authority.

These data strongly support a public choice interpretation of the CON requirement, as opposed to a public good interpretation. Had this law been designed to protect the public health, safety, and welfare, it would not have allowed persons to file

interventions that provided no data or allegations regarding the consequences for public health, safety, or welfare if the application were granted. Had the statute been intended to protect the public from dangerous or incompetent movers, such statements would have been required to be notarized or sworn, or to specify admissible evidence relating to public, rather than private concerns. Had it been designed to protect the public, it would not have explicitly instructed the AHC to consider the "diversion of traffic or revenue" when considering an application.[93] Likewise, if the CON requirement were an effective means for protecting the general public, it is unlikely that an applicant's decision to amend his application and seek a narrower region for operation would have resulted in the withdrawal of the objections. Instead of a statutory regime organized around public concerns, the data reveal the Missouri CON as a law which served solely the private interests of existing firms against legitimate competition from newcomers. All of the interventions were limited to established firms' concerns that granting a CON would harm their profits.

Equally revealing were the outcomes of the two cases in which applicants chose to proceed through the hearing process to obtain statewide authorization. Daryl Gaines' application had been subjected to three interventions. After a hearing in 2005, the Administrative Hearing Commission rejected Gaines' application on the grounds that his proposed business would compete with existing firms. While acknowledging that "Gaines is in compliance with applicable safety requirements," and "is in compliance with applicable insurance requirements,"[94] the Commission ruled that "Intervenors...already reliably provide statewide common carrier household goods service throughout the State," and that "Gaines' proposed service would merely duplicate service already provided."[95] Three years later, Gaines filed a new application, again seeking statewide moving authority. Five existing companies intervened, again citing as the sole basis of objection that Gaines' firm would cause "diversion of revenue" from them. But this time, Gaines chose to amend his application and ask for authority only to operate within the city of Columbia—whereupon the five existing firms withdrew their objections, and Gaines was given a Certificate to operate within that city.

All Metro Movers, on the other hand, succeeded in obtaining statewide moving authority. Its application was subjected to nine interventions.[96] The Administrative Hearing Commission found that the company was safe and had all the required insurance.[97] And, as in *Gaines*, the Commission found that All Metro Movers would compete with existing firms.[98] But this time, it concluded that competition was reason for granting the Certificate: "All Metro's evidence is sufficient to show a benefit to the public...from increased competition. The intervenors have focused only on the detriment to themselves."[99] This public benefit, the Commission ruled, proved that granting a Certificate to All Metro Movers—which had obtained a lucrative Defense Department contract—was consistent with public convenience and necessity.

In short, the statutes governing the issuing of CONs for moving companies in Missouri were so vague that a fully qualified, fully insured company could not know whether it would be *granted* a license on the grounds that competition would *benefit* the public, or whether that same competition might count as reason for *refusing* the application. Although it is impossible to measure the *in terrorem* effect that such vagueness had, the evidence is most consistent with the conclusion that would-be moving firms sought to avoid going through a hearing whenever possible—even if that meant accepting a less-than-optimal range of operating authority.

The evidence from the Missouri CON law for moving companies is consistent with the predictions of public choice theory: the law operated exclusively as a barrier to entry that benefitted existing firms. It provided no realistic benefit to the general public in terms of safety, price, availability, or in any other sense.[100] Indeed, the state admitted that it was unaware of any facts to support the conclusion that the intervention procedure had resulted in the government obtaining information that helped to protect the general public.[101]

On July 10, 2012, shortly after the Federal District Court for the Eastern District of Missouri was asked to rule on the constitutionality of this law, the state legislature chose to repeal it, and to replace it with a far more pro-competitive licensing statute which requires only that a mover be safe, insured, and qualified. Specifically, the licensing statute now contains no reference to the protection of existing carriers, and provides only that "[i]f the state Highways and Transportation Commission finds that an applicant seeking to transport household goods or passengers is fit, willing and able to properly perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the state Highways and Transportation Commission established thereunder, a certificate therefor shall be issued."[102] This statute represents a dramatic change from one of the most anti-competitive to one of the most pro-competitive licensing regimes in the nation. In the period since it was signed, the average wait time for a moving license in Missouri has dropped from 154 days to 19 days.[103]

III. The Constitution And Regulation for The Public Interest

A. The Constitution And Private-Interest Lawmaking

While there may be some argument that CON laws promote a genuine public good in the realm of public utilities, or markets with monopoly characteristics, they can have no such justification in normal, competitive markets like the moving industry. In these areas, CON laws only protect established firms against legitimate competition in violation of the Due Process and Equal Protection Clauses.[104]

Those Clauses prohibit government from using its power solely to benefit politically influential groups, as opposed to the general public.[105] While legislatures enjoy broad discretion to define the public interest and to adopt means for securing that interest, regulation that serves only *private* interests is arbitrary and discriminatory and contradicts the principles of due process of law.[106] The Constitution's authors, relying on five centuries of Anglo-American common law tradition,[107] presumed a distinction between the public interest and the private interests of those "factions" which would manipulate the political system for their own advantage.[108] They believed that equal laws guaranteeing individual rights, and a judiciary zealously guarding minorities against legislative exploitation,[109] would be the best protections against factional abuses. Or, in the words of Professor Cass Sunstein, the Constitution contains several provisions that "focus[] on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."[110]

Ideally, courts in constitutional cases scrutinize laws to ask, among other things, whether they reasonably advance a real public interest, or whether they are mere exercises of political power for private interest, and thus unconstitutional. Unfortunately, courts today apply different standards of scrutiny to different types of cases. For example, laws that differentiate between people on the basis of "suspect classifications" or that infringe on "fundamental rights," are subjected to heightened scrutiny, while laws that infringe on "non-fundamental" rights or "non-suspect" classifications are reviewed under the extremely deferential standard of "rational basis." When courts apply meaningful scrutiny, they stand as a significant check against the factional or rent-seeking tendencies that plague the democratic legislative process. But where courts apply excessively deferential review, they blind themselves to such abuses and allow legislative factions to exploit weaker groups and violate their rights for self-interested reasons.[111]

The consequences of variable standards of scrutiny are often perverse. For example, in cases involving the dormant commerce clause, courts apply a searching standard of review to invalidate self-interested legislation that imposes burdens on out-of-state businesses for the benefit of in-state businesses, without any corresponding public benefit.[112] The Supreme Court rightly regards such laws as harmful to consumers and entrepreneurs—as well as the national body politic—and as an abuse of the legislative process for the private benefit of politically well-connected businesses.[113] Such laws are a perversion of legislative power, which ought be devoted to public concerns rather than a scramble for "naked preferences."[114] Likewise, the application of heightened scrutiny in cases involving freedom of speech or religion have largely ensured that the "marketplace of ideas"[115] remains free from government favoritism, and that ideological interest groups do not pervert government powers away from their intended public uses, toward the promotion of ideas preferred by politically powerful

groups, or against the ideas of the unpopular.[116] For example, when religious groups seek to use public schools to propagate their views, courts routinely intervene, declaring that such instances of legislative capture are contrary to the hands-off policy of the Establishment Clause: religious groups must spread their messages in the marketplace of ideas without government assistance.[117]

Yet the advent of rational basis scrutiny in cases involving government regulation of business has resulted in a constitutional "double standard"[118] whereby courts regularly ignore their duty to guard against the exploitation of government power by private interest groups. Rational basis review—which applies generally to government regulation of business or economic transactions—calls for the court to presume the law constitutional and requires the plaintiff to prove its irrationality.[119] Under this test, the government will prevail even where the challenged law is ineffective, has little factual support, or has deleterious side-effects. Although the rational basis test does still bar the government from employing its authority solely to promote the private interests of politically influential factions,[120] its extreme pro-government deference tends to blind courts to the presence of such abuse, and incapacitate the judiciary as an independent and coordinate branch of government.[121] This problem is nowhere more obvious than when it comes to the constitutionality of laws that bar entry into trades or professions.

B. Occupations And Licenses

The Supreme Court first considered the constitutionality of occupational licensing laws in *Dent v. West Virginia*,[122] when it upheld the constitutionality of medical licensing requirements. Justice Stephen Field, writing for a unanimous Court, ruled that although "every citizen has the "undoubted[]" right "to follow any lawful calling, business, or profession he may choose," government may impose "such regulations as, in its judgment, will...secure [people] against the consequences of ignorance and incapacity as well as of deception and fraud." So long as those regulations were "appropriate to the calling or profession, and attainable by reasonable study or application," they would be upheld. But when such requirements "have no relation to such calling or profession, or are unattainable by such reasonable study and application...they can operate to deprive one of his right to pursue a lawful vocation."[123] That standard was reaffirmed in 1957, in *Schware v. Board of Examiners*,[124] when the Court ruled that New Mexico could not bar a person from practicing law because he was a member of the Communist Party. The state could restrict entry into professions, but only if those restrictions must be related to a person's fitness, skills, or knowledge.[125] Otherwise, those restrictions would arbitrarily deprive a person of the liberty to practice a trade—thus violating the Due Process Clause.

Over the past decade, the Fifth,[126] Sixth,[127] Ninth,[128] and Tenth[129] Circuits have addressed cases in which occupational licensing laws were used not to protect the public health, safety, or welfare, but simply to protect established businesses against legitimate economic competition from newcomers. In *Craigmiles v. Giles*,[130] the Sixth Circuit ruled that a Tennessee law that prohibited people from selling coffins unless they were licensed funeral directors violated the Fourteenth Amendment because the licensing requirement bore no realistic connection to public safety. The plaintiffs sought only to sell coffins, not to officiate at funerals or handle corpses, yet the licensing requirement would have forced them to spend years learning these and other skills for which they had no use—a prohibitively expensive burden. This requirement, declared the court, did not have a reasonable connection to a legitimate public interest, but was instead aimed at "protecting a discrete interest group from economic competition," which "is not a legitimate governmental purpose."[131] In *St. Joseph Abbey v. Castille*,[132] the Fifth Circuit struck down a similar restriction on the sale of funeral merchandise in Louisiana, declaring that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."[133] In *Merrifield v. Lockyer*,[134] the Ninth Circuit ruled that a licensing requirement for pest-control workers was unconstitutional where it required extensive training in the use and storage of pesticides, notwithstanding that the practitioner did not use pesticides. This requirement applied only to persons dealing with pigeons, rats, or mice, but not to persons dealing with any other kind of pest, which the court found to be strong evidence that the law "was designed to favor economically certain constituents at the expense of others similarly situated."[135] As with the Fifth and Sixth Circuits, the court concluded that "mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."[136] The Tenth Circuit, on the other hand, has ruled that under the rational basis test, the government *may* enact barriers to entry for the sole purpose of protecting established firms against competition.[137] The Supreme Court has so far chosen not to resolve this conflict.

C. The Constitution And CON Laws

But as we have seen, CON laws differ from ordinary occupational licensing laws in that they do not even purport to restrict entry into a profession based on a person's fitness or capacity to practice. Instead, they exist for the explicit purpose of preventing legitimate competition against a discrete economic interest group. What, then, of their constitutionality?

The Supreme Court has rarely considered CON restrictions in competitive markets.[138] Yet in three cases between 1925 and 1935, the Court invoked the rule that restrictions on a person's right to economic freedom must bear some sensible

relationship to protecting the public safety—and must not be used, as CON laws often are, as a device for creating and maintaining government-run monopolies.

In *Buck v. Kuykendall*,[139] the Supreme Court struck down a Washington state law imposing a CON restriction on bus companies. The plaintiff, a Washington resident, sought to operate a bus line between Seattle and Portland, and obtained an Oregon license, but Washington denied him a certificate on the grounds that existing rail service between the two cities was "adequate."[140] He sued, and in an opinion by Justice Brandeis, the Court ruled that the restriction unconstitutionally burdened interstate commerce, holding that the "primary purpose" of the statute was "not regulation with a view to safety or to conservation of the highways, but the prohibition of competition." The law "determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner."[141] A year later, in *Frost v. Railroad Commission*,[142] the Court again struck down a similar restriction for moving companies. The California statute in that case required any private carrier to obtain a CON, and be deemed a common carrier, in order to operate on public streets. In an opinion by Justice George Sutherland, the Court ruled that this law was "in no real sense a regulation of the use of the public highways," but "a regulation of the business of those who are engaged in using them," the "primary purpose" of which was "to protect the business of those who are common carriers in fact by controlling competitive conditions."[143]

But the case that most directly addressed the use of CON laws to restrict competition is *New State Ice Co. v. Liebmann*,[144] a 1932 decision in which the Court, over a single dissent, ruled that an Oklahoma law restricting the operations of ice delivery companies violated the Fourteenth Amendment. That law prohibited the operation of ice manufacturing and delivery to any business not in possession of a certificate of authority. To obtain a certificate, an applicant was required to attend a hearing and prove "the necessity for the manufacture, sale, or distribution of ice" in the locality.[145] If there was already a licensed ice manufacturer in the area, and it was "sufficient to meet public needs," the application would be denied.[146] Although the agency could also consider an applicant's qualifications, the statute authorized the state to deny license to fully qualified, experienced, safe, and efficient ice-makers solely because a new business would compete with existing companies.

When Ernest A. Liebmann began constructing an ice plant, existing ice businesses sought an injunction to prohibit him from entering the business. The District Court refused to issue the license, concluding that the manufacture and delivery of ice was not a public utility, and therefore not properly subject to a CON requirement.[147] Outside the context of public utilities, such laws tended to establish cartels, by enabling existing businesses to block competition and keep up their prices without any corresponding public benefit. Indeed, the District Court noted that the statute had

already caused such consequences: "the act of the Legislature here under consideration in its actual operation and effect has had the result in many cities and towns of the state of absolutely destroying all competition in the manufacture and distribution of ice," wrote Judge John C. Pollock. "[T]he act has had in actual operation the effect of enhancing the price charged by the ice plants to the consumers of ice when and where competition has been eliminated."[148] But the more conclusive objection was that applying CON restrictions to a fully competitive market like the ice-making and delivery business created a barrier to entry that benefited private interests—the established ice-makers—and restricted the liberty of entrepreneurs.[149] The statute did not bar fraudulent or unsafe practices, but only allowed existing firms to reap monopoly benefits.[150] The legislature could not simply declare by *ipse dixit* that a fully competitive market like the ice business was a public utility, subject to a CON restriction.

The Tenth Circuit affirmed.[151] As with the District Court—and, ultimately, the Supreme Court's—the Court of Appeals based its conclusion not on economic theory but on a constitutional analysis of individual rights informed by economic realities.[152] The right to practice a trade or profession was among the liberties protected by the Fourteenth Amendment, and although the government could restrict that freedom so as to protect the general public from harm, it could not arbitrarily restrict that freedom, either to benefit politically powerful interest groups, or as a capricious and senseless act.[153] Thus government could regulate all businesses to protect the public safety, but the propriety of regulations depended in part on the characteristics of the markets to which those regulations applied.[154] Businesses that enjoyed a special relationship to the government, or industries featuring certain monopoly characteristics could be more closely regulated than ordinary, fully competitive businesses.[155] But such justifications could not apply to ordinary, competitive industries. In these markets, "the right to engage in a business...is a matter of common right," and "a limitation" on entry would be "[a] great[] encroachment on the rights of the citizen.... [T]o justify such a limitation, there must exist strong[] circumstances, making the regulation necessary in order to protect the public."[156] No such circumstances existed in the ice business, which was a fully competitive industry with relatively low start-up costs and few opportunities for monopolistic behavior that might warrant price regulation or entry restriction.[157]

The law fared no better before the Supreme Court. In a 6-2 opinion by Justice Sutherland,[158] the Court ruled that the manufacture and delivery of ice was not a public utility, but a fully competitive industry, where barriers to entry tended to perpetuate, rather than alleviate, monopoly.[159] Although ice might be an important commodity, the same was true of many other ordinary commodities; that was not enough to make the business a utility like a publicly-owned railroad, or a natural monopoly like a ferry. Government could more closely regulate the latter types of businesses because consumers lacked the full degree of choice that would prevent businesses from taking

advantage, or because government granted such businesses special privileges for which it might impose certain demands in return.[160] But the ice business was not a beneficiary of such privileges, nor did it feature natural barriers to competition greater than those existing in any ordinary business. The Oklahoma law did not, therefore, counteract a perceived market failure, but simply excluded newcomers from the marketplace, for private benefit:

> Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice.... There is no question now before us of any regulation by the state to protect the consuming public.... The [law's] aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed.[161]

Two years after *New State Ice*, the Supreme Court began the famous "Switch in Time" line of cases, which among other things created the "rational basis test" for economic regulations.[162] Yet the Court has never repudiated *New State Ice*, and in 1941, well after the new regime was in place, it employed a similar analysis to invalidate a New York law requiring a CON before a business could open a milk processing facility. In *H.P. Hood & Sons v. DuMond*,[163] the Court made clear that the restriction—which was not "supported by health or safety considerations but solely by...limitation of competition"[164]—was unconstitutional. Of course, the state could impose regulations on milk production and shipping so as to protect public safety, but not for purposes of economic protectionism. "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."[165] The concept of "destructive competition," at which the statute explicitly aimed, was not enough to allow the state to restrict the rights of entrepreneurs. True, *DuMond*, like *Buck*, was decided on Commerce Clause grounds.[166] But the Court has elsewhere made clear that the Fourteenth Amendment also bars states from imposing barriers to economic competition that serve solely to protect established industries against legitimate competition.[167]

Yet where *DuMond*'s anti-protectionism rationale is faithfully followed in today's Commerce Clause jurisprudence,[168] *intra*-state discrimination, such as CON laws, which

offend constitutional values of liberty and equality, can often escape the judiciary's notice thanks to rational basis scrutiny. That is because this test is so deferential toward the government that courts presume a challenged regulation constitutional and construe any possible doubts in favor of the government. Some courts have even gone so far as to say that facts are irrelevant in rational basis cases,[169] and that a court may devise its own rationale to support a challenged law, even where no evidence supports that justification, and even where the state itself has abandoned that justification.[170] The Supreme Court has backed away from these extreme interpretations of the rational basis test,[171] but it is clear that the level of deference accorded to economic regulations under rational basis still masks a great deal of private exploitation of government power.[172] If a court must uphold the constitutionality of an economic regulation whenever the legislature might have thought—or even just *claimed*—that it related somehow to a public interest, then laws restricting the liberties of innocent entrepreneurs simply to benefit politically influential insiders can evade constitutional boundaries designed to protect individual rights. Rational basis review thus encourages, if it does not actually require, courts to require the constitutional violations of individual rights categorized as "economic."[173]

The Missouri case provides a good example of how this might happen. Although in the end, no court addressed the constitutionality of that law before it was repealed, one can easily imagine a judge upholding it despite the overwhelming evidence that the law served no genuine public interest. If, as some courts have declared, the question in a rational basis case is not whether the law actually serves a public interest, but whether lawmakers could have believed it would, then a judge might have felt constrained to ignore this evidence, and resolve the case on the basis of a purely imaginary justification of the statute.[174] In fact, a Virginia federal district court recently dismissed a constitutional challenge to a CON law on the grounds that "[t]he concept of" that law was to address "a legitimate government interest."[175] Under the rational basis test, the court ruled, any evidence regarding "the benefits of allowing [the plaintiffs] to engage in their profession" or "about the negative effects of [the challenged] laws" were "entirely beside the point."[176] Thus "[e]ven if plaintiffs had evidence that Virginia's [CON] laws do not in fact advance [the government's asserted] interest," such evidence "would be of no moment."[177] That decision was in error, at least for procedural reasons,[178] but it is hardly the only instance in which a court, applying rational basis deference, has ignored the clear rent-seeking abuses at the heart of a licensing law.[179] Worse yet, the Tenth Circuit has ruled that economic regulations need not bear any relationship to public health, safety, or welfare in order to survive rational basis scrutiny: the legislature may bar competition for the sole purpose of granting a privilege to existing firms.[180] A more realistic rational basis review—and a more balanced understanding of the legitimate state interest prong of that test—would hold that while the legislature has broad authority to regulate economic activities to

protect public health, safety, and welfare, it has no rightful authority to restrict an entrepreneur's economic freedom of choice in order to serve the private interests of politically powerful factions.

Conclusion

While courts defer to the legislature's decision that a certain industry needs regulation, or that a particular kind of regulation is appropriate, they cannot acquiesce in arbitrary restrictions of liberty, or regulations that do not realistically promote public goals. When a law bars a person from engaging in a trade solely in order to promote the private interests of established firms, the courts should intervene to protect the entrepreneur's right to earn a living—a right, after all, which is deeply rooted in this nation's history and tradition,[181] with roots reaching deep into the common law.[182] Indeed, Justice William Douglas called the right to work to support oneself at a common occupation "the most precious liberty that man possesses."[183] The Supreme Court has accordingly allowed states to bar entry into certain professions only where doing so is reasonably related to the applicant's skills and qualifications.[184] Where the restrictions bear no such relationship, but only protect established insiders from competition, the Court has ruled them unconstitutional.[185]

CON restrictions do not purport to relate to a person's qualifications or skills. They exist for the explicit purpose of barring economic competition against established firms. Such restrictions on entry may perhaps have some justification in some special kinds of markets, but they cannot be justified in ordinary, fully competitive markets such as the moving industry. The now-repealed Missouri statute regulating the moving industry provides a prime example of how CON laws operate in the real world. Existing firms wield them as a weapon against competition without regard for public safety considerations, and because the costs of regulation are so severe for newcomers, it is a very effective weapon, indeed. The consequences are higher costs for consumers, and, what is worse, fewer economic opportunities for the wealth-creating entrepreneurs who drive the nation's economy and who need economic opportunity the most.[186] In ordinary, competitive markets, therefore, CON laws are unconstitutional.

Notes

[1] *See generally* JAMES CHAN, SPARE ROOM TYCOON 1-26 (2000).

[2] *Cf.* Dent v. West Virginia, 129 U.S. 114, 121 (1889) ("the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose...may in many respects be considered as a distinguishing feature of our republican institutions.").

[3] *See, e.g.*, Schware v. Bd. of Examiners, 353 U.S. 232, 238-39 (1957).

[4] *See generally* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING ch. 7 (2010).

[5] *Schware*, 353 U.S. at 238-39.

[6] *See, e.g.*, Craigmiles v. Giles, 312 F.3d 220, 228-29 (6th Cir. 2002); Merrifield v. Lockyer, 547 F.3d 978, 991-92 (9th Cir. 2008). *See further* Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976).

[7] *See* William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 427 (1979) ("The essence of the certificate of public convenience and necessity is the exclusion of otherwise qualified applicants from a market because, in the judgment of the regulatory commission, the addition of new or expanded services would have no beneficial consequences or, in a more extreme case, would actually have harmful consequences.").

[8] MO. REV. STAT. § 390.051 (2011).

[9] Munie v. Koster, No. 4:10CV01096 (E.D. Mo. filed Mar. 7, 2011).

[10] Courts strongly presume "prior restraints" to be unconstitutional when applied to the press. New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). This is because the First Amendment's authors regarded the pre-publication licensing requirements of the Stuart Monarchy as the prototypical violation of free speech under the British Constitution. Blackstone denounced them as such, on the grounds that requiring permission of a licenser prior to publication "is to subject all freedom of sentiment to the prejudices of one man, and make him arbitrary and infallible judge of all controverted points." 4 W. BLACKSTONE, COMMENTARIES *152. The founders accordingly viewed prior restraints as the quintessential form of censorship. *See* Grosjean v. Am. Press Co., 297 U.S. 233, 249 (1936); Near v. Minnesota, 283 U.S. 697, 713-14 (1931). But Blackstone's description of the prior restraints of the Stuart era makes clear that these restrictions were business licenses: they operated as before-the-fact restrictions on who could own and operate a press and issue publications. In *Areopagitica*, John Milton described such licensing requirements as a form of monopoly, likening them to the business restrictions so common in mercantilist England:

> I cannot set so light by all the invention, the art, the wit, the grave and solid judgement which is in England, as that it can be comprehended in any twenty capacities how good soever, much lesse that it should not passe except their [*i.e.*, licensers'] superintendence be over it, except it be sifted and strain'd with their strainers, that it should be uncurrant without their manuall stamp. Truth and understanding are not such wares as to be monopoliz'd and traded in by tickets and statutes, and standards. We must not think to make a staple commodity of all the knowledge in the Land, to mark and licence it like our broad cloath, and our wooll packs. What is it but a servitude like that impos'd by the Philistims, not to be allow'd the sharpning of our own axes and coulters, but we must repair from all quarters to twenty licencing forges.

JOHN ALIVS, ED., AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON 29-30 (1999). The arguments Milton and others leveled against licensing for the press apply equally to CON laws for

industries other than the media. *See further* Timothy Sandefur, *Insiders, Outsiders, and the American Dream. How Certificate of Necessity Laws Harm Our Society's Values*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 381, 406-07 (2012).

[11] *See, e.g.*, MO. REV. STAT. § 390.051(1) (2011); NEV. REV. STAT. § 706.386 (2012); KY. REV. STAT. § 281.615 (2012); OR. REV. STAT. § 825.100 (2008).

[12] *See, e.g.*, MO. REV. STAT. 390.051(2) (2011);NEV. ADMIN. CODE § 706.1375 (2012); KY. REV. STAT. § 281.620 (2012); OR. REV. STAT. § 825.125 (2008).

[13] *See, e.g.*, MO. CODE REGS. tit. 7, § 265-10.015 (2011); NEV. REV. STAT. § 706.391(2) (2012); KY. REV. STAT. § 281.630 (2012); OR. REV. STAT. § 825.102(2) (2008).

[14] *See, e.g.*, MO. CODE REGS. tit. 7, § 265-10.015 (7)(A) (2011); NEV. REV. STAT. § 706.391(9) (2012); 601 KY. ADMIN. REGS. 1:030(2) (2012). Some states impose a fee on any protest. *See* MONT. ADMIN. R. 38.3.402(c) (fee of $500).

[15] For example, Kentucky statutes requires the state's Transportation Cabinet Division of Motor Carriers to convene a hearing if an objection is filed, but allows it discretion to dispense with the hearing if no objection is filed. KY. REV. STAT. § 281.625(2) (2012). Nevada, on the other hand, requires a hearing in all cases. NEV. REV. STAT. § 706.391(1).

[16] One extreme example is to be found in the City Ordinances of Bloomington, Illinois. Under ch. 40, sec. 206, of the City Code, the City Manager is empowered to issue CONs for taxicab services on the basis, *inter alia*, of whether she "finds that further taxicab service in the City of Bloomington is desirable." No definition of "desirable" is provided. *See further* Timothy Sandefur, *Why do Bloomington bureaucrats get to decide when competition is "desirable"?* PLF LIBERTY BLOG, Apr. 9, 2013, http://blog.pacificlegal.org/2013/why-do-bloomington-bureaucrats-get-to-decide-when-competition-is-desirable/.

[17] Courts have ruled that in the realm of public utilities, at least, the phrase "public convenience and necessity" is a term of art that is not unconstitutionally vague.

[18] *See, e.g.*, MO. CODE REGS. Tit. 1, §15-3.250(3); In re Discipline of Schaefer, 117 Nev. 496, 509 (2001); Ky. State Bar Ass'n v. Henry Vogt Machine Co., Inc., 416 S.W.2d 727, 727-28 (Ky. 1967).

[19] *See* KY. REV. STAT. § 281.615 *ET SEQ.* (2012).

[20] KY. REV. STAT. § 281.990(2) (2012).

[21] KY. REV. STAT. § 281.625(1) (2012). *See also* 601 KY. ADMIN. REGS. 1:030(2) (2012).

[22] KY. REV. STAT. § 281.630 (2012).

[23] Several state cases have reviewed "convenience and necessity" determinations, particularly in cases involving utilities, but not has fashioned a clear definition of these terms. For example, in *Red Star Transp. Co. v. Red Dot Coach Lines*, 220 Ky. 424, 427-28 (1927), the Kentucky Court of Appeals stated that "[i]nconvenience may be so great as to amount to necessity."

[24] As recently as 2008, the Oregon Department of Transportation based its determinations of public convenience and necessity on a 1992 order from the Oregon Public Utility Commission—a different agency entirely—which did not define the statutory terms, but listed only general principles and factors that had been considered relevant in the past. *See* Sandefur, *Insiders, Outsiders, supra* note 10 at 403-05. There was no regulatory or statutory authority for relying on that order. Likewise, as noted below, the Missouri Department of Transportation Motor Carrier Services Division used "statements of support" to determine the "usefulness" of a proposed moving service even though there was no statutory or regulatory authority for doing so.

[25] 601 KY. ADMIN. REGS. 1:030(4) (2012).

[26] *Henry Vogt Machine Co.*, 416 S.W.2d at 727-28.

[27] *Cf.* Consolidated Coach Corp. v. Kentucky River Coach Co., 249 Ky. 65, 74-75 (1933) (applying, under predecessor statute, the "rule of prohibition" that so long as an existing company is already adequate, or is likely to become adequate, an application for a competing service must be denied.).

[28] For example, in September, 2012, the Kentucky Transportation Cabinet denied a Certificate to applicant Michael Ball in a written decision that acknowledged that Ball had been in the moving business for 35 years and that even his own competitors acknowledged he "would make a great mover." Report and Recommended Order Denying Application, *In re. Application of Michael Ball Moving & Storage, LLC*, Ky. Transp. Cabinet Docket No. 12-091 (Feb. 19, 2013) at 6 (on file with author). The application was denied solely because "applicant did not prove that the existing household goods moving service in Louisville is inadequate and that his proposed service is needed." *Id.* at 9.

[29] Jones, *supra* note 7 at 439.

[30] *Id.* at 428.

[31] *See, e.g.*, GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM 13-14 (1963). One example is to be found in DAVID SYME, OUTLINES OF AN INDUSTRIAL SCIENCE 56 (1876): "Every one knows that excessive competition produces enormous waste, and that it leads to the perpetration of fraud, the extent of which is generally in proportion to the intensity or keenness of competition."

[32] *See id.* at 61 (using railroad example).

[33] This latter theory was sometimes used to supplement an additional theory of "predatory pricing," which held that businesses would purposely cut their prices below market levels as the first step in an effort to drive out competitors. The second step would then be to raise prices to monopoly levels. This dubious theory became the basis of various antitrust regulations, *see* DOMINIC T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE 63-64, 171-72 (2d ed. 1990). The merits of that theory are beyond the scope of this paper, however, because the theory of "excessive competition" on which CON laws were based was not necessarily part of a "predatory pricing" theory. The theory of "excessive competition" does not see price-cutting solely as part of a monopoly strategy, but rather as an economic incentive that creates a race to the bottom in terms of quality.

[34] *See generally* 3 FRIEDRICH HAYEK, LAW, LEGISLATION AND LIBERTY 67-77 (1979) (explaining how competition is a discovery procedure); MURRAY ROTHBARD, MAN, ECONOMY, AND STATE 575-76 (rev. ed. 2001) (same).

[35] *See generally* Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

[36] *See generally* JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962), especially ch. 19

[37] *See* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 611 (1969) ("the fear of ruinous competition seems largely groundless.").

[38] *See generally* JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY ch. 7 (New York: Harper, 1975) (1942).

[39] *See* 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION 221-23 (1971) (explaining the economic efficiency of "cream-skimming").

[40] Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 761 n.240 (1985).

[41] *See generally The Civil Service And The Statutory Law of Public Employment*, 97 HARV. L. REV. 1611, 1619-32 (1984).

[42] *See* Uber, https://www.uber.com (visited Apr. 25, 2013).

[43] *See, e.g.*, Michael B. Farrell, *Taxi Fleet in Boston Sues over App That Hails Rides*, BOSTON GLOBE, Mar. 13, 2013 (visited Apr. 25, 2013); Ken Yeung, *Uber Faces New Lawsuit from SF Taxi Drivers over Unfair Practices*, THE NEXT WEB, Nov. 14, 2012, avail. at http://thenextweb.com/insider/2012/11/14/class-action-lawsuit-filed-against-uber-by-san-francisco-taxicab-drivers-citing-unfair-business-competition/ (visited Apr. 25, 2013).

[44] See, e.g., Donald N. Zillman & Michael T. Bigos, *Security of Supply And Control of Terrorism: Energy Security in The United States in The Early Twenty-First Century, in* BARRY BARTON, ET AL., EDS., ENERGY SECURITY: MANAGING RISK IN A DYNAMIC LEGAL AND REGULATORY ENVIRONMENT 154 (2004). It is actually doubtful whether CONs make sense in monopolistic markets, since such laws explicitly bar competition and therefore exacerbate the monopolistic features of such markets, if anything. William B. Tye, *The Economics of Public Convenience And Necessity for Regulated Utilities*, 60 TRANS. PRACTITIONERS J. 143 (1993); STEVEN FERREY, THE NEW RULES: A GUIDE TO ELECTRIC MARKET REGULATION 191 (2000). But perceived monopoly features often lead to government implementing a franchise style of regulation in order to prevent the business from obtaining monopoly advantages. Such restrictions could be imposed without a CON requirement, simply by mandating that firms undertake those obligations, but not requiring pre-approval for entry into the market. After all, if the market really is monopolistic, the CON requirement's barrier to entry would not be necessary. *But see* CHRISTOPHER CASTANEDA, REGULATED ENTERPRISE: NATURAL GAS PIPELINES AND NORTHEASTERN MARKETS, 1937-1954 at 6-7 (1993) (arguing that "intense competition" is present in some such markets).

[45] Readers of a certain age will recall the "New Coke" fiasco of 1985, when the Coca-Cola Corporation, surely among the most sophisticated businesses in the history of capitalism, with all imaginable resources at its disposal to predict consumer desires, concluded that the public wanted a new recipe for Coca-Cola. In fact, the product was such a spectacular flop that Coca-Cola restored its original recipe only two months later, and "New Coke" became a by-word for poor marketing decisions. MATT HAIG, BRAND FAILURES: THE TRUTH ABOUT THE 100 BIGGEST BRANDING MISTAKES OF ALL TIME 8-14 (2011). If Coca-Cola could not anticipate what consumers desired when it came to soda recipes, it seems extremely unlikely that government bureaucrats can determine, without such research, what sort of transportation needs consumers have in a dynamic economy. While the "New Coke" example may seem jocular, this is an extremely serious matter; societies in which decisions about resource use are made entirely, or almost entirely, by the government—that is, communist societies—suffer tremendously in consequence of this "calculation problem." *See generally* Ludwig von Mises, *Economic Calculation in The Socialist Commonwealth* (Joseph Salerno, trans., Mises Institute: 1990) (1920), avail. at http://mises.org/pdf/econcalc.pdf (visited Apr. 25, 2013).

[46] Michael M. Grynbaum, *2 Taxi Medallions Sell for $1 Million Each*, N.Y. TIMES CITY ROOM, Oct. 20, 2011, http://cityroom.blogs.nytimes.com/2011/10/20/2-taxi-medallions-sell-for-1-million-each/. The City has for many years capped the number of taxicab medallions available at 13,237, far below even the number of taxis operating in 1937, when that number was fixed. Robert Hahn and Peter Passell, *Million Dollar Taxis: Another Wall Street Ripoff?* FORBES, Oct. 30, 2011, http://www.forbes.com/sites/econmatters/2011/10/30/million-dollar-taxis-another-wall-street-ripoff/. A recent effort by the state legislature to increase the transportation options available to New York consumers was ruled unconstitutional by a state court judge. Taxicab Serv. Assn. v State of N.Y., 2012 N.Y. Misc. LEXIS 4098 (N.Y. Sup. Ct. Aug. 17, 2012). That case is now on appeal.

[47] Quoted in RONALD COASE, THE FIRM, THE MARKET, AND THE LAW 196 (1990).

[48] Posner, *supra* note 37 at 612.

[49] *Cf.* Juarez Gas Co. v. FPC, 375 F.2d 595, 599 (D.C. Cir. 1967) ("an affected competitor...is deemed to be in position to advance matters which are relevant and material for consideration by the" agency considering the CON application).

[50] *See, e.g.*, MO. CODE REGS. tit. 7, § 265-10.015(7)(A) (specifying that "[a]ny interested motor carrier that transports household goods in intrastate commerce" may file intervention, but not providing for consumers to do so).

[51] *See, e.g.*, MO. REV. STAT. § 390.051(5) (2011) ("In cases where persons object to the issuance of a certificate, the diversion of revenue or traffic from existing carriers shall be considered."); NEV. REV. STAT.

§ 705.391(2) (2012) ("the Authority shall grant the certificate or modification if it finds that...the operation...will foster sound economic conditions within the applicable industry...will not unreasonably and adversely affect other carriers operating in the territory...[and] will benefit and protect...the motor carrier business....").

[52] Jones, *supra* note 7 at 486.

[53] Oliver Wendell Holmes, *The Path of The Law*, 10 HARV. L. REV. 457, 469 (1897).

[54] Paul H. Gardner, Jr., *Entry and Rate Regulation of Interstate Motor Carriers in Missouri: A Strategy for Reform*, 47 MO. L. REV. 693, 707 (1982).

[55] *See* Joseph P. Kalt, *Market Power And The Possibilities for Competition, in* JOSEPH P. KALT & GRANK C. SCHULLER, EDS., DRAWING THE LINE ON NATURAL GAS REGULATION 115 (1987) ("Under [CON] certification, incumbent certificate holders typically argue that public convenience does not require a new entrant into the market if the result would divert traffic away from the incumbent. But 'traffic diversion' is the essence of competition and the weakest fo reasons to block entry into an industry."); *see also* Mark W. Fankena & Paul A. Pautler, *Taxicab Regulation: An Economic Analysis*, 9 RES. IN L. & ECON. 129, 145-46 (1986) ("the agencies that regulate taxis may not be motivated primarily by concern for market failure and efficiency. This is evident from the fact that a number of common regulations (e.g., restrictions on entry and minimum fares) have no persuasive efficiency justification.").

[56] Munie v. Koster, No. 4:10CV01096 (filed June 18, 2010).

[57] A thorough analysis and perceptive critique of the Missouri statute is Gardner, *supra* note 54.

[58] MO. REV. STAT. § 390.051(1).

[59] *Id.* § 390.051(4).

[60] *Id.* § 390.051(5).

[61] In *State ex rel. Ozark Elec. Coop. v. Pub. Serv. Comm'n*, 527 S.W.2d 390, 394 (Mo. Ct. App. 1975), the Court of Appeals acknowledged that "[f]or some reason, either intentional or otherwise, the General Assembly has not seen fit to statutorily spell out any specific criteria to aid in the determination of what is 'necessary or convenient for the public service.'"

[62] Deposition of Barbara Hague, Nov. 21, 2011, *Munie v. Skouby* No. 4:10-CV-01096-AGF at 6-7 (hereafter "Hague Depo.") (on file with author).

[63] *Id.*

[64] *Id.* at 10. No statute or regulation authorized the Division to do this, or established that such statements would satisfy this statutory criterion. It appears that the Division simply decided to do this on its own as an unwritten regulation.

[65] *Id.* at 10-12.

[66] MO. CODE REGS. tit. 7, § 265-10.015(7)(A).

[67] Hague Depo., *supra* note 62 at 7.

[68] MO. REV. STAT. § 390.062 (2011).

[69] *Id.*

[70] Hague Depo., *supra* note 62 at 7.

[71] The Division would then to intervene before the AHC in order to participate in the hearing as a party.

[72] MO. CODE REGS. tit. 1, § 15-3.250(3).

[73] The allocation of the burden of proof on this question is a significant matter. Placing that burden on the applicant will result in a default rule against allowing new competition, while placing that burden on the intervenor would result in a presumption in favor of competition. *See Consolidated Coach Corp.*, 249 Ky. at 74-75 (applying default against competition). Yet the advantage conferred by a burden of proof can easily be undone. In 2013, New Mexico enacted HB 194, which among other things amended N.M. STAT. ANN. § 65-2A-13 to shift onto objectors the burden of proving that a CON should be denied to an applicant. But the language the statute uses shows that this provides little, if any, protection for

applicants. An existing firm is required only to prove "all *matters of fact* pertaining to its full-service operation within its certificated full-service territory, the burden of proving the *potential* impairment or adverse impact on its existing full-service operation by the transportation service proposed by the applicant." *Id.* (emphasis added). This only means the firm must prove that it currently operates a business and that there might be competition from the applicant. The statute also imposes on applicants the burden of "proving any particular factual matters that the commission...may identify and require," and "the burden of proving any additional allegations and matters of public interest that it may raise." *Id.* This means that once an existing firm shows some potential competitive "impact" from a new firm, the government may then "require" the applicant to prove that its proposed operation is "necessary" — whereupon the burden of proof once again shifts to the applicant. This New Mexico statute is among the most explicitly anti-competitive licensing laws in the United States.

[74] MO. REV. STAT. § 390.051(5) (2011).

[75] Missouri Department of Transportation Motor Carrier Services Division, *2011 Division Tracker* at 6c(1), avail. avail. at http://www.modot.org/mcs/documents/January2012D-tracker.pdf (visited Mar. 27, 2013).

[76] In their document production requests, Plaintiffs sought copies of all applications filed within the period of January 1, 2005 and the filing of the lawsuit on June 10, 2010. This time period was chosen to avoid unduly burdening the defendants.

[77] Defendants provided 75 such applications. A 76th, All Metro Movers, discussed *post*, was discovered prior to the hearing on Plaintiffs' motion for summary judgment.

[78] Plaintiffs' Statement of Uncontroverted Facts, *Munie v. Skouby* No. 4:10-CV-01096-AGF at ¶¶ 59, 62 (hereafter SUF) (on file with author).

[79] Sixteen such firms were identified during discovery, *id.* at ¶59, but the All Metro Movers application was discovered prior to oral argument on the motion for summary judgment. *See supra* note 98.

[80] SUF, *supra* note 78 at ¶ 101.

[81] MO. REV. STAT. § 390.020(4) (2011).

[82] SUF, *supra* note 78 at ¶102.

[83] *Id.* ¶ 113.

[84] Hague Depo., *supra* note 62 at 36.

[85] SUF, *supra* note 78 at ¶ 81.

[86] *Id.* ¶¶ 86-88.

[87] *Id.* ¶ 45. This pattern was so common that the state's Motor Carrier Services Division typically made reference to it in the documents it filed with the AHC. Whenever an intervention was filed, and the case was referred to the AHC, the Division would file its own intervention in order to participate at the hearing (although, as explained above, the hearings were typically cancelled when the applicant chose to withdraw the original application). The Division's interventions were boilerplate documents that declared "[i]n many cases involving contested applications for intrastate operating authority, before or during the hearing, the Applicant may decide to restrictively amend the scope of the requested operating authority, in consideration of an agreement by one or more protesting intervenors to withdraw their opposition to the Application." Entry of Appearance and Motion to Intervene by the Missouri Highways & Transportation Commission, In re. Servant Enterprises d/b/a Action Moving, Sept. 15, 2008, at 1-2 (on file with author).

[88] Declaration of Billy Holloway, Jr., in Support of Plaintiffs' Motion for Summary Judgment, *Munie v. Koster*, No. 4:10-CV-01096-AGF (on file with author).

[89] SUF, *supra* note 78 at ¶ 46.

[90] *Id.*

[91] In re. D. Gaines, Inc., No. 05-0227 MC, 2005 Mo. Admin. Hearings LEXIS 73 (2005).

[92] In re. Application of All Metro Movers, LLC, No. 07-1835 MC, 2008 Mo. Admin. Hearings LEXIS 299 (2008).

[93] MO. REV. STAT. § 390.051(5).

[94] 2005 Mo. Admin. Hearings LEXIS 73 at *12.

[95] *Id.* at **15-16. The Commission also found that no evidence had been presented regarding Gaines' net profits, net worth, and other financial matters which would have shown his "fitness" under the statute. *Id.* at **13-14.

[96] 2008 Mo. Admin. Hearings LEXIS 299 at *1.

[97] *Id.* at *18.

[98] *Id.* at *23.

[99] *Id.* at **23-24.

[100] These findings are consistent with Thomas Gale Moore, *The Beneficiaries of Trucking Regulation*, 21 J. L. & ECON. 327 (1978), which analyzed federal trucking regulations. Those regulations, which included a CON requirement for interstate movers, were reformed in the 1980s—saving consumers billions of dollars. Robert W. Hahn & John A. Hurd, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233, 268-70 (1991); Nancy L. Rose, *The Incidence of Regulatory Rents in The Motor Carrier Industry*, 16 RAND J. ECON. 299 (1985).

[101] SUF, *supra* note 78 at ¶35. *See also* Hague Depo., *supra* note 62 at 35 (Q: "Do you have any experience of this intervention process being used to prevent fraud?" A: "I know that some of our applicants, whether it was household goods or for transportation of property, have not been someone who would not commit fraud." Q: "And has—in such a situation have intervenors provided you with the information necessary to stop fraud?" A: "I think in those cases staff found out the information themselves through the safety aspects of our reviews." Q: "So you would say that there's safety aspects of your review and then the intervention? You would separate those two out?" A: "Correct.").

[102] MO. REV. STAT. § 390.051(3) (2013).

[103] Missouri Department of Transportation Motor Carrier Services Division, *2012 Division Tracker* at 4c(1), avail. avail. at http://www.modot.org/mcs/documents/jan2013dtracker.pdf (visited Apr. 26, 2013).

[104] They also violate the Privileges or Immunities Clause, but courts have largely refused to enforce that provision since *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *See generally* Timothy Sandefur, *Privileges, Immunities, And Substantive Due Process*, 5 NYU J. L. & LIBERTY 115 (2010).

[105] St. Joseph Abbey v. Castille, 712 F.3d 215, 222-23 (5th Cir. 2013); *Merrifield*, 547 F.3d at 991; *Craigmiles*, 312 F.3d at 224. *Contra*, Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005). The *Merrifield* court distinguished between Due Process and Equal Protection principles in the context of licensing requirements. It held that a licensing regime that imposes unnecessary and irrational burdens on a person prior to entering a trade violates only the Due Process Clause, and not the Equal Protection Clause. *See* 547 F.3d at 985-86. But in *Craigmiles*, the Sixth Circuit ruled that the Equal Protection Clause bars government from employing a licensing law in such a way as to grant privileges to some practitioners of a trade over and above other similarly situated practitioners. *See, e.g.*, 312 F.3d at 225 (relevant class was "those who sell funeral merchandise."). While the *Merrifield* court was right that unnecessarily burdensome licensing laws can violate the Due Process Clause even when they do not establish irrational classifications, it appears to have overlooked the fact that a licensing regime necessarily categorizes practitioners into the licensed and the unlicensed—and ascribes benefits or burdens accordingly. If that categorization is not rationally related to a legitimate government interest—that is, if the requirements for obtaining a license are not related to public health and safety—then the licensing law necessarily creates one class with privileges and one class with burdens that are irrational, in violation of the Equal Protection Clause. Whatever may have been true of *Merrifield*, therefore, licensing requirements like CON laws that give licensees the privilege of essentially vetoing the economic

liberty of their would-be competitors do create classifications unrelated to a legitimate state interest, and consequently violate the Equal Protection Clause.

[106] *See generally* Timothy Sandefur, *In Defense of Substantive Due Process, or, The Promise of Lawful Rule*, 35 HARV. J. L. & PUB. POL'Y 283, 299-307 (2012).

[107] *See id.* at 287-94.

[108] *Cf.* THE FEDERALIST No. 10 at 57 (J. Cooke ed., 1961) (James Madison) (defining faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.")

[109] *Id.* No. 78 at 521-30.

[110] Cass R. Sunstein, *Naked Preferences And The Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

[111] *See generally* Steven M. Simpson, *Judicial Abdication And The Rise of Special Interests*, 6 CHAP. L. REV. 173 (2003).

[112] *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142-43 (1970); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

[113] *See, e.g.* Granholm v. Heald, 544 U.S. 460, 472 (2005) ("States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)).

[114] Sunstein, *supra* note 110.

[115] This phrase has its roots in Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.")

[116] *See, e.g.*, Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2288 (2012) ("The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.").

[117] Surprisingly little public choice literature has addressed the rent-seeking dynamics surrounding public school curricula. But it is clear that powerful interest groups lobby government entities routinely to manipulate the content of curricula to serve their ideological agendas. The efforts of creationist groups to have evolutionary science removed—or counteracted through "equal time" requirements, disclaimers—is only the most obvious example of this rent-seeking, which is oriented toward an ideological goal rather than an economic one. Court decisions invalidating such efforts hold that while people are free to propagate anti-evolution ideas, they may not use the government to obtain what is essentially a subsidy in that effort. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 714 (M.D. Pa. 2005). Of course, defenders of creationism view it as a subsidy when government-run schools teach evolution. *See, e.g.*, Francis J. Beckwith, *Public Education, Religious Establishment, And The Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 461, 469 (2003) ("excluding non-materialist...accounts of natural phenomena" from public school curricula is "intellectual imperialism.").

[118] Lynn A. Baker & Ernst A. Young, *Federalism And The Double Standard of Judicial Review*, 51 DUKE L.J. 75, 80-87 (2001).

[119] *See generally* Romer v. Evans, 517 U.S. 620, 632 (1996).

[120] As Professor Sunstein has put it, *supra* note 110 at 1692, "[t]he 'reasonableness' constraint of the due process clause is perhaps the most obvious example" of a prohibition on "naked preferences"—i.e., the exploitation of government power for private, rather than for public purposes.

[121] *See, e.g.*, SANDEFUR, *supra* note 4 at 134.
[122] 129 U.S. 114 (1889).
[123] *Id.* at 121-22.
[124] 353 U.S. 232 (1957).
[125] *Dent*, 129 U.S. at 122 ("If [restrictions on entry] are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty.... [But] when they have no relation to such calling or profession, or are unattainable by such reasonable study and application...they can operate to deprive one of his right to pursue a lawful vocation."); *Schware*, 353 U.S. at 239 (restrictions on entry into profession "must have a rational connection with the applicant's fitness or capacity to practice [that] profession."); *see also* Douglas v. Noble, 261 U.S. 165, 168 (1923) ("If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment.")
[126] *St. Joseph Abbey*, *supra* note 104.
[127] *Craigmiles*, 312 F.3d at 220.
[128] *Merrifield*, *supra* note 6.
[129] Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1638 (2005).
[130] 312 F.3d 220 (6th Cir. 2002).
[131] *Id.* at 224.
[132] 2013 WL 1149579 (5th Cir. Mar. 20, 2013).
[133] *Id.* at *5.
[134] 547 F.3d 978 (9th Cir. 2008).
[135] *Id.*
[136] Id. at 991 n. 15.
[137] *Powers*, 379 F.3d at 1221 ("we hold that, absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.").
[138] Most of the Court's decisions involving CON restrictions have, of course, involved public utilities. *See, e.g.*, Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1988); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983). Such cases are beyond our scope here. A particularly helpful article on early CON law cases is Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 GEO. MASON L. REV. 405 (1996).
[139] 267 U.S. 307 (1925). *Buck* was decided along with a companion case, *Bush Co. v. Malloy*, 267 U.S. 317 (1925), which invalidated a similar Maryland law on the same grounds. Justice McReynolds dissented, on the grounds that the CON laws were reasonable means of protecting the structural stability of roads built at state expense.
[140] *Buck*, 267 U.S. at 313.
[141] *Id.* at 315-16.
[142] 271 U.S. 583 (1926).
[143] *Id.* at 591-92.
[144] 285 U.S. 262 (1932). A superb overview of the *Liebmann* case is HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND 54-61 (1994).
[145] OKLA. STAT. ch. 147 sec. 3 (1925), avail. at http://s3.documentcloud.org/documents/412219/oklahoma-manufacture-and-distribution-of-ice-act.pdf.
[146] *Id.*
[147] 42 F.2d 913, 917-18 (W.D. Okla. 1930).
[148] *Id.* at 918.

[149] *See id.* ("The manufacture and sale of a commodity such as ice is a useful and honorable private business and calling in which any citizen so disposed has the undoubted right under our Constitution and laws to engage by investing his capital and selling his time and energy, at any time, and in any suitable and convenient place his judgment may dictate to him.").

[150] *See id.* (existing firms "would not invite the competition the operation of defendant's plants will bring them.").

[151] 52 F.2d 349 (10th Cir. 1931).

[152] A common accusation against the "*Lochner* era" judiciary is that it based its decisions on "economic theory." In reality, the decisions of this era were based on a robust conception of individual liberty that traced back to the classical liberal views of the Constitution's framers. *See* SANDEFUR, *supra* note 4 at 83. Neither *Lochner* nor the other cases associated with this tradition were based on economic considerations. On the contrary, in these cases, it was the defenders of the legislation who asserted economic theories; in their view, economic factors should trump the long-standing precedent protecting an individual's right to economic autonomy. This is why Louis Brandeis, as an attorney supporting minimum wage legislation, submitted the famous "Brandeis Brief" putting forward economic arguments. *See generally* David P. Bryden, *Brandeis' Facts*, 1 CONST. COMMENT. 281 (1994). In cases like *Muller v. Oregon*, 208 U.S. 412 (1908), or *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), it was the advocates of government intervention—not its opponents—who argued that economic factors justified state intrusion on traditional realms of individual choice. This was the main thrust of Roscoe Pound's famous argument that by rejecting such arguments, the courts were ignoring the "realities" of modern industrial life. *See generally* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

[153] 52 F.2d at 351-52.

[154] *Id.* at 353 ("The inquiry then is whether the manufacture and sale of ice is a business affected with a public interest to the extent required to justify the regulations sought to be imposed. This requires an examination into the nature of the business, the features thereof which touch the public, and the abuses reasonably to be feared.").

[155] *Id.*

[156] *Id.* at 354.

[157] *Id.* at 355 ("while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices.").

[158] 285 U.S. 262 (1932). Justice Cardozo did not participate.

[159] *Id.* at 278 ("the practical tendency of the restriction, as the trial court suggested in the present case, is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.").

[160] In *Munn v. Illinois*, 94 U.S. (4 Otto) 113 (1877), the Supreme Court held that although the grain silos at issue did not meet the definition of monopoly or utility, they were nevertheless in a unique market position such that they were "affected with a public interest," and thus were similar to monopolies, and could be regulated on that account. *Id.* at 126. In dissent, Justice Stephen Field argued that this theory unduly expanded the concept of monopoly. *Id.* at 140 ("If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature."). But Field did not dispute that actual natural monopolies or franchises could be closely regulated by the government. *See further* PAUL KENS, STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE ch. 5 (1997).

[161] *New State Ice*, 285 U.S. at 278-79. Justice Brandeis' dissent, joined by then-Justice Stone, has become a classic, far more often cited and quoted than the majority opinion. *See* Sandefur, *Insiders, Outsiders, supra*

note 10 at 413-15. Although Brandeis' argument that states should be free to "experiment" with regulatory schemes has frequently been cited with approval, few writers have acknowledged the majority's answer, that "experimentation" is not a permissible excuse to violate the Constitution. *See New State Ice*, 285 U.S. at 279-80. It is noteworthy that Brandeis and Stone were the only judges, out of the 12 that reviewed the constitutionality of the Oklahoma law, who found any merit in it. Even then, as Phillips observes, *supra* note 138 at 443-47, Brandeis' argument in favor of the law is notably weak. Brandeis essentially admitted that it was private interest legislation designed to establish a cartel: "Trade journals and reports of association meetings of ice manufacturers bear ample witness to the hostility of the industry to such competition, and to its unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character." *New State Ice*, 285 U.S. at 292-93 (Brandeis, J., dissenting).

[162] Nebbia v. New York, 291 U.S. 502, 537-38 (1934). *Nebbia*, however, still maintained that "arbitrary or discriminatory" laws would still be unconstitutional under the Fourteenth Amendment. *Id.* at 537.

[163] 336 U.S. 525 (1949).

[164] *Id.* at 531.

[165] H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949).

[166] It is hard to see why courts should regard interstate protectionism and intrastate protectionism differently. The Constitution contains no explicit prohibition on either; the prohibition on interstate protectionism that is a bedrock of dormant commerce clause jurisprudence is, as *DuMond* makes clear, heavily based on the context and background of the Commerce Clause. But the guarantee of the right of all persons to engage in trades free of arbitrary state interference is equally well-grounded in the background of the Fourteenth Amendment. One author has attempted to distinguish the two on the grounds that "[t]he policy behind preventing interstate economic protectionism is to prevent barriers to the development and maintenance of a national marketplace," and "the textual hook for interstate economic protectionism's unconstitutionality derives from the enumerated [power] of the federal government over interstate commerce." Katharine M. Rudish, *Note: Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism As A Legitimate State Interest*, 81 FORDHAM L. REV. 1485, 1525-26 (2012). But the prohibition on interstate protectionism is at least equally rooted in an intent to protect every person's freedom to engage in a trade across state lines. *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 101-02 (1980). And the Fourteenth Amendment's Due Process, Equal Protection, and Privileges or Immunities Clauses were aimed at preventing barriers to the development and maintenance of a free marketplace within states—that is, to protect the freedom of industry. *See* SANDEFUR, *supra* note 4 at 39-44. As the Court recently reminded us, the purpose of the federalist structure is to protect individual freedom. Bond v. United States, 131 S. Ct. 2355, 2364-66 (2011). While the "textual hook" for barring interstate protectionism is Congress' exclusive power over the matter, the "textual hook" for prohibiting protectionism within the state is the Amendment's guarantee against states depriving people of liberty without due process of law, or denying them equal protection, or abridging the privileges or immunities of citizens. This last has a particularly strong connection to anti-protectionism, given that the Fourteenth Amendment's Privileges or Immunities Clause was based largely on Justice Bushrod Washington's anti-protectionist interpretation of the Article IV Privileges or Immunities Clause in *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823). *See* SANDEFUR, *supra* note 4 at 41. One might also contend that the dormant commerce clause is rooted in preventing the economic, political, and social disruption caused by states erecting protectionist barriers. This is no doubt true. *See, e.g.*, Adam Badawi, *Unceasing Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 Cal. L. Rev. 1331, 1333 (2003) ("Curtailing the economic chaos created by a dearth of centralized power was a prominent motivation for including the Commerce Clause among the

enumerated powers of Congress."). But similar economic, political, and social disruption results from intrastate barriers. *See, e.g.*, Chaddock v. Day, 75 Mich. 527, 531-32 (1889) ("It is quite common in these later days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts."). Anticompetitive legislation disrupts society, creates resentment, and unjustly deprives people of opportunities *within* states, too. *See* Sandefur, *Insiders, Outsiders, supra* note 10 at 407-08. The Fourteenth Amendment was written to provide federal protection against such disruptions.

[167] *See, e.g.*, Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985).

[168] *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 472-73 (2005).

[169] *See, e.g., Beach Communications*, 508 U.S. at 315.

[170] *See, e.g.*, Shaw v. Oregon Public Employees' Retirement Bd., 887 F.2d 947, 948 (9th Cir. 1989) ("courts may properly look beyond the articulated state interest in testing a statute under the rational basis test.... A court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack." (citations and quotation marks omitted)).

[171] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996).

[172] *See* SANDEFUR, *supra* note 4 at ch. 6.

[173] In consequence, plaintiffs often struggle to characterize economic freedom as some kind of preferred freedom, so as to qualify for meaningful judicial scrutiny. For example, a series of lawsuits challenging state laws against the sale of sexual devices failed to convince courts to apply the heightened scrutiny applicable to "privacy" rights; instead, the courts characterized the right at issue as economic, applied rational basis review, and upheld the challenged statutes. Williams v. Morgan, 478 F.3d 1316, 1320-21 (11th Cir. 2007); Williams v. Attorney General of Ala., 378 F.3d 1232 (11th Cir. 2004); Pleasureland Museum, Inc. v. Beutter, 288 F.3d 988 (7th Cir. 2002). But while laws against *sale* were held constitutional, laws prohibiting advertisement were held unconstitutional, because the courts applied heightened scrutiny. *See* This That And The Other Gift and Tobacco, Inc. v. Cobb County, 439 F.3d 1275 (11th Cir. 2006) (challenging laws against advertising sale of adult novelties).

[174] *Cf.* Pontarelli Limousine v. Chicago, 704 F. Supp. 1503, 1516-17 (N.D. Ill. 1989) (upholding discriminatory taxi regulation that "just barely" satisfied the Equal Protection Clause); Executive Town & Country Services, Inc. v. Atlanta, 789 F.2d 1523, 1528 (11th Cir. 1986) (upholding a minimum price requirement for limousines which was designed to prevent competition with taxicabs, despite the court's recognition that "[t]he city's reasons for legislating these minimum fare regulations are not very compelling," and "passed the 'rational basis' test...with little room for comfort.").

[175] Colon Health Ctrs. of Am., LLC v. Hazel, 2012 WL 4105063 at *5 (E.D. Va. Sept. 14, 2012).

[176] *Id.*

[177] *Id.* at *6.

[178] The court erroneously dismissed the complaint prior to factfinding, theorizing that under rational basis review, the plaintiffs could prove no set of facts that could entitle them to relief. *Id.* But the Supreme Court has made clear that plaintiffs in rational basis cases are entitled to engage in discovery and introduce evidence to prove their cases, if the complaint is adequately pled. *See* Borden's Farm Products v. Baldwin, 293 U.S. 194, 209 (1934); Nashville, C. & S. L. Railway v. Walters, 294 U.S. 405, 414-15 (1935); Polk Co. v. Glover, 305 U.S. 5, 9-10 (1938). *See further* Timothy Sandefur, *Rational Basis And The 12(b)(6) Motion: An Unnecessary "Perplexity,"* avail. at http://ssrn.com/abstract=2229261 (visited Apr. 29, 2013).

[179] *See, e.g.*, Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, 198 Fed. Appx. 348 (5th Cir. 2006).

[180] *Powers*, 379 F.3d at 1221 ("intrastate economic protectionism constitutes a legitimate state interest.").

[181] *Cf.* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

[182] *See generally* SANDEFUR, *supra* note 4 at 17-25.

[183] Barsky v. Bd. of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

[184] *See, e.g.*, *Schware*, 353 U.S. at 239.

[185] *See, e.g.*, *New State Ice*, 285 U.S. at 278-79; *Buck*, 267 U.S. at 313; *Frost*, 271 U.S. at 591-92.

[186] *See* Sandefur, *Insiders, Outsiders*, *supra* note 10 at 405-08.

Appendix D

2014 WL 375601
Only the Westlaw citation
is currently available.
United States District Court,
E.D. Kentucky,
Central Division,
at Frankfort.

Raleigh **BRUNER**, et al., Plaintiffs,
v.
Tom **ZAWACKI**, Commissioner of Motor Vehicle Regulation for the Kentucky Department of Vehicle Regulation, et al., Defendants.

Civil Action No. 3: 12–57–DCR. | Feb. 3, 2014.

Synopsis

Background: Moving company and its principal filed § 1983 action against members of Kentucky Transportation Cabinet Division of Motor Carriers alleging that state's application process for obtaining household goods certificate infringed on their constitutional right to pursue occupation of providing moving services in state, in violation of Due Process And Equal Protection Clauses. Plaintiffs moved for summary judgment.

Holdings: The District Court, Danny C. Reeves, J., held that:

[1] plaintiffs had standing to bring action, and

[2] statutory scheme violated applicant's due process and equal protection rights .

Motion granted.

West Codenotes

Held Unconstitutional
KRS 281.625KRS 281.630

Attorneys and Law Firms

Kristopher David Collman, The Getty Law Group, PLLC, Lexington, KY, Joshua P. Thompson, Timothy Sandefur, Pacific Legal Foundation, Sacramento, CA, for Plaintiffs.

Opinion

MEMORANDUM OPINION AND ORDER

DANNY C. REEVES, District Judge.

***1** This matter is pending for consideration of Plaintiffs Raleigh **Bruner's** and Wildcat Moving, LLC's motion for summary judgment. [Record No. 72] The Plaintiffs contends that they are entitled to summary judgment on their claim that the notice, protest, and hearing provisions of the Kentucky statutes applicable to moving companies, contained within KRS § 281.615 *et seq.*, and the implementing regulations, violate the Fourteenth Amendment of the United States Constitution. They request that the Court issue prospective injunctive relief, permanently enjoining the Defendants from enforcing the statutes in a way that violates the constitutional rights of new moving companies by allowing existing moving companies to veto new competition.

For the reasons set forth below, the Plaintiffs' motion will be granted.

I.

Wildcat Moving, LLC ("Wildcat"), is a Kentucky limited liability company owned by Raleigh **Bruner**. [Record No. 1, p. 2 ¶ 2] **Bruner** offered his moving services informally *via* the Internet until forming Wildcat in 2012, "to operate as a full-service moving company throughout the state of Kentucky." [*Id.*] Since 2012, Wildcat has moved thousands of clients. [Record No. 73, p. 8] It now employs thirty-one people, including **Bruner**, and operates five moving trucks. [*Id.*, p. 4 ¶ 10] However, Wildcat has been performing moving services without the requisite certificate under Kentucky law.

In Kentucky, individuals and companies involved in moving—that is, the intrastate transporting of personal effects and property used or to be used in a dwelling —are required by statute to obtain a Household Goods Certificate, also known as a Certificate of Public Convenience and Necessity (hereafter, a "Certificate") from the Kentucky Transportation Cabinet Division of Motor Carriers (hereafter, the "Cabinet"). *See* KRS § 281.615 *et seq.*[1] Operating without a Certificate is a misdemeanor punishable by a fine ranging from $2,000 to $3,500 and imprisonment of up to thirty days. KRS § 281.990(2).

Under the statute, a Certificate:

> shall be issued to any qualified applicant therefor[e], authorizing the whole or any part of the operation covered by the application, if it is found that the applicant is *fit, willing, and able* properly to perform the service proposed and to conform to the provisions of this chapter and the requirements and the administrative regulations of the department promulgated thereunder, *and further that the existing transportation service is inadequate,* and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity, and that the proposed operation, to the extent authorized by the certificate, will be consistent with the public interest and the transportation policy declared in this chapter....

KRS § 281.630(1) (emphasis added).

This statute and the corresponding regulations establish a multi-step process to obtain a Certificate. First, an aspiring mover such as **Bruner** submits his application to the Cabinet. The Office of Legal Services reviews the application to determine whether the applicant is "fit, willing, and able to properly perform the service proposed." KRS § 281.630(1);

[Record No. 73–2, p. 6 lns. 4–7] In addition to a finding that an applicant is "fit, willing and able," the mover must show that existing moving services are "inadequate," and that a new moving company serves the "present or future public convenience and necessity." KRS § 281.630(1).

***2** An applicant is required to publish notice of his application in a newspaper of general circulation in the proposed territory or e-mail existing certificate holders. KRS §§ 281.625(b), 281.6251. Following the notification, "[a]ny person having interest in the subject matter may ... file a protest to the granting, in whole or in part, of the application." KRS § 281.625(2). If a protest is filed, the department must hold a hearing. Otherwise, the hearing is discretionary. KRS § 281.625(2); *see also* 601 KAR. § 1:030(4)(1). The length of time until a hearing takes place varies. A hearing may be held sixty to ninety days after the filing of the protest, but it may take up to a year. [Record No. 73–2, p. 30 lns. 12–15] Additionally, applicants are generally required to be represented by counsel at the hearing. *See Ky. State Bar Ass'n v. Henry Vogt Machine Co., Inc.*, 416 S.W.2d 727 (Ky.1967) (representation of a corporation before administrative bodies constitutes the practice of law).

Since 2007[2], thirty-nine new applications for Certificates have been filed by companies seeking to enter the moving business.[3] [Record No. 73, p. 11; *see, e.g.,* Record No. 73–10.] Existing moving companies have filed 114 protests in opposition to these applications. [*Id.; see, e.g.,* Record No. 73–14.] However, no protest has ever been filed by a member of the general public. [Record No. 7, pp. 16–17] Of the decided applications, nineteen were protested by one or more Certificate-holding moving companies. [Record No. 73, p. 11] Of those nineteen protested applicants, sixteen chose to abandon or withdraw their applications. [Record No. 73–8] The Defendants concede that it is "a common result" for a protested applicant to abandon the application process rather than go through the hearing process with a moving company already in business. [Record No. 73–2, p. 13 lns.4–5] Ultimately, the three applicants which chose to undergo the hearing procedure were all denied Certificates. [Record No. 73–18] In summary, the Cabinet has never issued a Certificate to a new applicant when a protest from a competing mover was made.

Even where a protested applicant is determined to be "fit, willing, and able," he or she will be denied an application if the applicant has not shown that existing moving services are inadequate .[4] [Record No. 73–18, pp. 8–9; Record No. 73–23, p. 5] Proof of a population explosion in the service area by expert testimony is not sufficient to overcome the competitor's protest. [Record No. 73–23, p. 3] It is also noteworthy that an existing moving company that protests an applicant for a new Certificate may offer the applicant the opportunity to buy a Certificate it holds. KRS § 281.630(8); [*See* Record No. 73–12, p. 6 (noting that two moving companies that protested the application of Margaret's Moving, LLC, offered to sell a Certificate to the applicants for $25,000.00).[5]] Further, no application for the sale or transfer of an existing Certificate has ever been protested or denied. [Record No. 73–8]

*3 The Plaintiffs filed this action under 42 U.S.C. § 1983 against members of the Cabinet in their official capacities (collectively "the Cabinet"), alleging that the notice, protest, and hearing procedure set out in KRS § 281.615 *et seq.*, and the corresponding regulations, are unconstitutional under the Fourteenth Amendment of the United States Constitution. The Complaint seeks both declaratory and injunctive relief.[6]

The Plaintiffs do not challenge the regulations to the extent an applicant for a Certificate is required to be "fit, willing, and able" to provide moving services. Instead, they claim that that the protest and hearing process currently followed infringe on their constitutional right to pursue the occupation of providing moving services in Kentucky in violation of due process. *See* U.S. Const. Amend XIV § 1. They also argue that the protest and hearing procedures violate the equal protection clause because they arbitrarily favor existing moving companies over new companies. *See id.* Further, the Plaintiffs assert that the statutes violate the privileges and immunities clause, and that the statutes are unconstitutionally vague.

II.

Summary judgment is required when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Chao v. Hall Holding Co.,* 285 F.3d 415, 424 (6th Cir.2002). A dispute over a material fact is not "genuine" unless a reasonable jury could return a verdict for the nonmoving party. That is, the determination must be "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see Harrison v. Ash,* 539 F.3d 510, 516 (6th Cir.2008). In deciding whether to grant summary judgment, the Court views all the facts and inferences drawn from the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Whether a rational basis exists for a government regulation is a question of law. *Greenbriar, Ltd. v. Alabaster,* 881 F.2d 1570, 1578 (11th Cir.1989). The rationality of a governmental policy is "a question of law for the judge—not the jury—to determine." *Myers v. Cty. of Orange,* 157 F.3d 66, 74 n. 3 (2d Cir.1998). As discussed more fully below, substantial latitude is granted to the government regarding legislative enactments. However, that latitude is not without limits.

III.

As noted, the Plaintiffs have moved for summary judgment on their claims that the notice, protest, and hearing procedures are unconstitutional under the Fourteenth Amendment of the United States Constitution. The Defendants oppose summary judgment,

arguing that material issues of fact remain to be decided. [Record No. 75, p. 7]

A. Standing

***4** **[1]** In its response to the Plaintiffs' motion for summary judgment, the Cabinet again argues that the Plaintiffs lacks standing to sue because they never completed the application process and thus were never subject to protests. [Record No. 75, p. 10] It also contends that the case is not ripe for review because Wildcat may be denied a Certificate even if the statutes in question are invalidated. These arguments are largely duplicative of the arguments previously made and rejected. [*See* Record No. 38; *see also Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 89, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (holding that a plaintiff "was not obligated to apply for a certificate of convenience and necessity and submit to the administrative procedures incident thereto before bringing [an] action.").] Although standing may be raised at any time, the Cabinet has raised no new arguments except to cite to a non-binding case from Nevada that decided a similar issue differently. [Record No. 75, p. 11 (citing *Underwood v. Mackay*, No. 3:12–cv–MMD–VPC, 2013 WL 3270564 (D.Nev. June 26, 2013).]

Even if *Underwood* were persuasive, this case is distinguishable because **Bruner** *is* "faced with the prospect of either punishment if he worked without a license or enduring much expense and effort to obtain the license." *Underwood*, 2013 WL 3270564, at *7 (quoting *Merrifield v. Lockyer*, 547 F.3d 978, 982 (9th Cir.2008)). The Defendants filed a complaint against **Bruner** in state court while the current case was pending, seeking to enforce the challenged statutes against him and to block him from operating as a moving company. [*See* Record No. 48–1, p. 2.] If anything, the Plaintiffs' injury is more concrete and particularized now than when the Defendants first asserted that the Plaintiffs lack standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (holding that to have standing, a plaintiff must establish an injury in fact, a casual connection between the injury, and that the injury will be redressed by a favorable decision).

Despite the Defendants' assertions to the contrary, the Court is not determining the Plaintiffs' fitness or ability to operate as a moving company. The determination of whether an aspiring moving company is "fit, willing, and able" rests solely and appropriately with the Cabinet.[7] *See* KRS § 281.630. The Plaintiffs' complaint is that a Certificate cannot be awarded over the protests of his competitors —even if they objectively satisfy the regulatory criteria. The evidence of record established that the denial is preordained where any protest is received. The Plaintiffs are left to risk prosecution or surrender business pursuits. In either circumstance, they have demonstrated injury. Moreover, the injury is traceable to the Defendants' actions in enforcing the Certificate requirement, demonstrated by the state court injunction action against the Plaintiffs. *See Lujan*, 504 U.S. at 560. A favorable decision by this Court would redress the injury, not because the Plaintiffs would automatically be granted a Certificate, but because the unconstitutional obstacle would be removed from their path to operate a moving company

in the Commonwealth. *See id*. Thus, the Court again finds that the Plaintiffs have standing.

B. Due Process and Equal Protection [8]

***5** The Plaintiffs argue that the notice, protest and hearing procedure violates the due process and equal protection clauses of the Fourteenth Amendment. Regarding due process, **Bruner** contends that his liberty interest in pursuing his chosen occupation and constitutionally protected "right to compete" are offended by the statutory scheme that acts as a "Competitor's Veto." *See Wilkerson v. Johnson,* 699 F.2d 325, 238 (6th Cir.1985); *Greene v. McElroy,* 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959). And they argue that the statutes run afoul of equal protection rights by favoring existing moving companies over new applicants. *See Merrifield v. Lockyer,* 547 F.3d 978, 991–92 (9th Cir.2008). They contend that the notice, protest, and hearing procedures are unconstitutional facially, and as applied to the moving industry. [9]

[2] **[3]** **[4]** Under the due process clause of the Fourteenth Amendment, the state may not deprive a citizen of life, liberty, or property without due process of law. *See* U.S. Const. Amend. XIV § 1. "The touchstone of due process is protection of the individual against arbitrary action of the government." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). The Fourteenth Amendment "prohibits the government from imposing impermissible substantive restrictions on individual liberty," including the liberty interest to pursue a chosen occupation. *Craigmiles v. Giles,* 110 F.Supp.2d 659, 661 (2000), *citing Washington v. Glucksberg,* 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1994); *Conn v. Gabbert,* 526 U.S. 286, 291–92, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999). Such a liberty interest is subject to reasonable regulation by the state, and the "burden is on the challenger to show that there is no rational connection between the enactment and a legitimate government interest." *Am. Express Travel Related Servs. Co. v. Ky.,* 641 F.3d 685, 689 (6th Cir.2011) (internal alterations and quotation marks omitted). [10]

[5] Under the rational basis test for an equal protection challenge to a legislative classification, the wisdom of the legislature's decision is not at issue, and the statutory classification can be based on speculation, so long as it is reasonable. *FCC v. Beach Commn'ns, Inc.,* 508 U.S. 307, 313–14, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

i. Rational Basis Review

[6] Because the statute does not regulate a fundamental right or distinguish between people on the basis of suspect characteristics, it need only survive rational basis review. *Craigmiles,* 312 F.3d at 223–24. And the parties agree that rational basis is the correct standard. That is, the regulation must bear some rational relation to a legitimate state interest. An economic regulation such as this is subject to a strong presumption of validity and it will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis" for the statute. *Maxwell's Pic–Pac, Inc., v. Dehner,* Nos. 12–6056/12–6057/12–6182, 2014 U.S.App. LEXIS 761, at *7–8 (6th Cir. Jan. 15, 2014) (*citing Beach Commc'ns,* 508

U.S. at 313-14).[11] The rational basis test is very deferential, but is not "toothless." *Mathews v. Lucas,* 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1967).

***6** The Plaintiffs' burden is substantial. A person or business seeking to invalidate a statute under rational basis review must "negative every conceivable basis that might support it." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973). "Only a handful of provisions have been invalidated for failing rational basis review." *Craigmiles,* 312 F.3d at 225; *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Peoples Rights Org., Inc. v. City of Columbus,* 152 F.3d 522 (6th Cir.1998)). But the Sixth Circuit has held that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles,* 312 F.3d at 224. Thus, the question before the Court is whether the notice, protest, and hearing procedure "bears a rational relationship to *any* legitimate purpose other than protecting the economic interests of" existing moving companies. *Id.* at 225 (emphasis added).

ii. Asserted Interests

The Defendants suggest three interests that are advanced by the relevant statues. First, they argue that the protest and hearing procedure protects personal property. [Record No. 75, p. 17] Next, they claim that the regulations reduce administrative and social costs to society. [*Id.*] Finally, they contend that the statutes "decrease information asymmetry problems present in private markets resulting from disparity in information held by parties" and prevent "excess entry" into the moving industry. [*Id.*]

[7] Protecting personal property and reducing administrative costs are certainly legitimate government interests. However, whether the protest and hearing procedure is rationally related to these legitimate interests is a different issue. *Craigmiles,* 110 F.Supp.2d at 662 ("[T]he mere assertion of a legitimate government interest has never been enough to validate a law."). Existing moving companies that protest new applicants are not required to offer (and none has ever offered) information about an applicant's safety record or information regarding the applicant's ability to safely operate as a mover. KRS § 281.625(2); 601 KAR. § 1:030(4)(1); [*see also* Record No.73, p. 12.] Further, there is no indication that personal property is protected at all by allowing existing moving companies to keep potential competition from entering the market. Protecting personal property is achieved by the first requirement that the applicant show that he is "fit, willing, and able" to operate as a moving company. KRS § 281.625. But the second requirement—which effectively requires competitors to approve a new company—undermines the stated goal. The Cabinet, in essence, is providing an umbrella of protection for preferred private businesses while blocking others from competing, even if they satisfy all other regulatory requirements.

Nor does the notice, protest and hearing provisions lower administrative costs. Rather, when a protest is filed, the Cabinet *must* hold a hearing. KRS § 281.625(2). Based on the

transcripts of those hearings, the owners of existing moving companies generally testify that existing moving services are adequate, not in quality but in quantity. [*See* Record Nos. 73–17; 73–22.] The hearings are presided over by a hearing officer who issues a recommendation, which is then adopted by the Cabinet. [*See, e.g.,* Record No. 73–22, p. 5.] Because the notice and protest procedures trigger the hearing requirement under the statute, the protest and hearing procedures actually increase administrative costs, especially where the result is pre-determined. In essence, both public and private resources are consumed in a futile administrative exercise.

***7** The defendants also posit, through their expert, [12] that preventing excess entry into the moving business serves the public because "too many individual private firms—working only under their own perceived needs and profit maximization goals—enter a market beyond the socially optimal amount, and thus impose costs on society." [Record No. 75, p. 18; Record No. 75–9, p. 3] The Defendants further speculate that an unprofitable moving company is "less likely to be able to take all necessary steps to promote the safety of its customers' personal property," which could "also directly endanger the public health as well if these forced costs savings result in physical harm to employees or other citizens." [Record No. 75–9, p. 3]

As the protest and hearing procedures are applied, however, an existing moving company can essentially "veto" competitors from entering the moving business for any reason at all, completely unrelated to safety or societal costs. The Cabinet undertakes no review regarding excess entry into the moving business. In fact, Cabinet officials testified that they had never heard of the phrase "excess entry." [13] [Record No. 73–1, p. 31; 73–2, p. 32] Cabinet officials also admitted that the Cabinet never takes such factors into consideration. [*Id.*] This alleged legitimate interest is further contradicted when one considers that many moving companies successfully operate for years without a Certificate and, therefore, without the Cabinet's determination that existing moving services are "inadequate." [*See* Record No. 73–18, p. 4 (noting that one new applicant operated as a moving company thirty-five years before applying for, and being denied, a Certificate).] To the extent that the protest and hearing procedure prevents excess entry into the moving business, it does so solely by protecting existing moving companies—regardless of their quality of service—against potential competition.

The Cabinet also asserts that the protest and hearing procedures serve information asymmetry concerns because the "notice" provision of the statute invites the public to participate in the hearing. [Record No. 73–4, p. 3] Information asymmetry occurs when "one party [to] a transaction has more pertinent information than another party which can result in private market transaction that are not as socially beneficial as could be obtained, or actually 'harm' one party." [Record No. 75–9, p. 2]

However, the statute being challenged is phrased in the disjunctive. That is, an applicant is required to publish notice in the newspaper *or* e-mail existing certificate holders, not both. KRS § 281.625(1). That existing moving

companies are the intended targets of the notice requirement is evidenced by the fact that all protests in the past five years have been filed by existing moving companies. [Record No. 73–7] No member of the general public has ever filed a protest or participated in a hearing. The protests filed by existing moving companies explicitly state that they are protesting because the applicant would be "directly competitive" to the companies and would "result in a diminution of protestant's revenues." [Record No. 73, p. 2] As the statute is applied, the only "information" supplied to new applicants is that no new competition is wanted.

iii. Economic Protectionism

***8** Because there is no link between the protest and hearing procedures and any alleged government interest in health and safety, the Plaintiffs have successfully negated the Defendants' purported purposes behind the procedure. *See Lehnhausen,* 410 U.S. at 364. The Court, undertaking its obligation to posit other conceivable reasons for validating the statute, finds none. *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Instead, its "more obvious illegitimate purpose to which [it] ... is very well tailored" is to act as "a significant barrier to competition in the [moving] market." *Craigmiles,* 312 F.3d at 228. "No sophisticated economic analysis is required to see the pretextual nature of the state's proffered explanations" for the regulations. *Id.* at 229.

The Sixth Circuit has held that economic protectionism is not a legitimate government interest.[14] *Craigmiles,* 312 F.3d at 229; *followed by St. Joseph Abbey v. Castille,* 835 F.Supp.2d 149, 157 (5th Cir.2008) (rejecting economic protectionism as a legitimate governmental interest in the context of the sale of coffins); *but see Powers v. Harris,* 379 F.3d 1208 (10th Cir.2004). "[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *City of Philadelphia v. N.J.,* 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) (discussing the commerce clause). This "measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review." *Craigmiles,* 312 F.3d at 229. Accordingly, based on the foregoing discussion and analysis, the Court finds that the notice, protest, and hearing procedures contained in KRS § 281.615 *et seq.,* as applied to the moving service industry in an act of simple economic protectionism, offend and violate the Fourteenth Amendment of the United States Constitution.

C. Privileges and Immunities

The Plaintiffs also argue that the statutes are unconstitutional under the privileges and immunities clause of the Fourteenth Amendment. But this clause, "largely dormant since the *Slaughter–House Cases,* 83 U.S. (16 Wall) 36, 21 L.Ed. 394 (1872), restricted its coverage to 'very limited rights of national citizenship' and held that clause did not protect an individual's right to pursue an economic livelihood against his own state." *Craigmiles,* 312 F.3d at 229. As in *Craigmiles,* the Court need not "break new ground" to determine the constitutionality of the protest and hearing procedures in question. *Id.* "Revival of the Privileges and Immunities Clause may be an

interesting and useful topic for scholarly debate but this memorandum is not the place for that discussion." *Powers v. Harris,* No. CIV–01–445–F, 2002 WL 32026155, at *24 (W.D.Ok. Dec.12, 2002).

D. Unconstitutionally Vague

Finally, the Plaintiffs argue that KRS § 280.630(1) is unconstitutionally vague. Specifically, they assert that the words "inadequate" and "present or future public convenience and necessity," as well as the requirement that the applicant prove "that there is a need for the service" under 601 KAR § 1:031(1), are unconstitutionally vague. [Record No. 73, pp. 31–32] "When a statute is not concerned with criminal conduct or first amendment considerations, the court must be fairly lenient in evaluating a claim of vagueness." *Doe v. Staples,* 706 F.2d 985, 988 (6th Cir.1983); *see also Maxwell's Pic Pac,* 2014 U.S.App. LEXIS 761, at *14–15. "[U]ncertainty in this statute is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible." *Exxon Corp. v. Busbee,* 644 F.2d 1030, 1033 (5th Cir.1981). The Kentucky Supreme Court and the applicable regulations have defined the terms "inadequate" and "present or future public convenience and necessity." *Eck Miller Transfer Co. v. Armes,* 269 S.W.2d 287, 289 (Ky.1954); *Germann Bros. Motor Trans., Inc. v. Flora,* 323 S.W.2d 570, 571 (Ky.1959); *see also* 601 KAR § 1:031. In short, this argument is unavailing to the Plaintiffs here.

IV.

***9** It bears repeating that a party bears a daunting task when challenging a statute under rational basis review. However, rational basis scrutiny is deferential, not completely "toothless." *Matthews,* 427 U.S. at 510. Where, as here, there exists a "measure to privilege certain businessmen over others at the expense of consumers [that] is not animated by a legitimate governmental purpose [it] cannot survive even rational basis review." *Craigmiles,* 312 F.3d at 229. Again, however, the Court reiterates that its holding is limited to the application of the statutes and regulations in issue to the moving service industry. This decision does not mean that past Certificates are invalidated; rather, that prospective moving companies in the future will not be subject to a "veto" from their competition before they may lawfully act as a moving company.

For the foregoing reasons, it is hereby

ORDERED as follows:

1. Plaintiffs Raleigh **Bruner's** and Wildcat Moving, LLC's Motion for Summary Judgment [Record No. 72] is **GRANTED** with respect to their claims that KRS § 281.615 *et seq.,* and implementing regulations, violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The Plaintiffs' remaining claims are **DISMISSED.**

2. The Defendants and their agents, officers, and successors, are **ENJOINED** from enforcing KRS § 281.615 *et seq.,* and any implementing regulations, as a "Competitor's Veto" as described above in the context of the moving service industry.

3. All claims having been resolved, this matter is **DISMISSED** and **STRICKEN** from the Court's docket.

4. A separate Judgment shall issue this date.

Footnotes

1 Proposed legislation is pending which would amend the Certificate requirement in the context of Household Goods. *See* 2014 Bill Text KY B.R. 92.

2 Wildcat limited its discovery requests to the date of January 1, 2007, until the filing of this lawsuit. [Record No. 73, p. 10 n. 4] It did so in to limit discovery to "manageable boundaries"; however, the Plaintiffs affirm that there are no facts to suggest that the protesting and hearing procedure operated in a different way previously. [*Id.*] And the Cabinet does not argue that the procedure has been different at any other time. [Record No. 73, p. 11]

3 Some of the applications are still pending. [Record No. 73, p. 11]

4 In that instance, the protesting party testified that the applicant "would be a great mover," but did not believe that Louisville needed another moving company. [Record No. 73–18, p. 6]

5 The Cabinet contends that Margaret's Moving, LLC, is an "exceptional" case that cannot be used to show standard practice of the application of the statutes. [Record No. 75] However, the Court has considered the extensive record of this case and finds each example consistent with the overall assertions of the Plaintiffs.

6 During discovery, the Cabinet filed a separate action in the Circuit Court of Franklin County, Kentucky, seeking a temporary injunction against Wildcat for operating as a moving company without first obtaining a Certificate. The Court granted the Plaintiffs' motion for a preliminary injunction, enjoining the Cabinet from enforcing the Certificate requirement against them until it reached the merits of their constitutional claims. [Record No. 51]

7 As noted in the Defendants' response, **Bruner** will be required to file an application allowing the Cabinet to assess his fitness to operate Wildcat as a moving company. [Record No. 75, p. 13]

8 The Court recognizes that the due process and equal protection clauses "protect distinctly different interests." *Powers v. Harris,* 379 F.3d 1208, 1215 (10th Cir.2004). Despite those differences, the Plaintiffs' due process and equal protection arguments will be analyzed together because they present the same issue, i.e., whether the notice, protest, and hearing procedures bear a rational relation to a legitimate interest. *See, e.g., Craigmiles,* 312 F.3d at 223–24 (evaluating due process and equal protection claims together under a rational basis standard).

9 The Court limits its review of the notice, protest, and hearing procedures to the Cabinet's application of the statutes to the moving industry. For the reasons discussed herein, the statutes are not facially unconstitutional, but offend rational basis only when applied to the moving industry. Whether the Court invalidates the statutes facially or as applied is not dispositive of the relief, because "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

10 In *American Express,* the Sixth Circuit overturned this Court's holding that a Kentucky statute violated due process because it bore no rational basis to a legitimate government interest. *American Express,* 641 F.3d at 691. That holding was based solely on "substantive due process," without the equal protection claims that are at issue here. *Id.* at 690–91. In addition, the statute in *American Express* was a revenue raising statute that did not touch on the economic protectionism that is of particular concern in *Craigmiles* and in this case. *See id.*

11 In *Maxwell's Pic–Pac,* the Sixth Circuit overturned a district court's holding that a Kentucky statute that prohibits groceries from obtaining a wine and liquor license violated the equal protection clause of the United States Constitution. *Maxwell's Pic–Pac,* 2014 U.S.App. LEXIS, at *2–3. However, unlike the case at hand, that holding was based solely on an equal protection challenge. *Id.* at. *7. And, unlike this case, economic protectionism was not at issue. In fact, neither the lower court nor the Sixth Circuit relied upon *Craigmiles. See id.; see also Maxwell's Pic Pac, Inc. v. Dehner,* 887 F.Supp.2d 733 (E.D.Ky.2012).

12 The Plaintiffs challenge the Defendants' expert, asserting that he had not read any of the discovery documents, has not done researched or published on matters relating to the relevant subject matter. [Record No. 73, p. 21 n. 9] But this assertion misses the point. The Defendants are not required to produce empirical data or evidence under the extremely low level of scrutiny that is applicable here. "A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe,* 509

U.S. 212, 320. Rather, "a legislative choice ... may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns,* 508 U.S. at 315.

13 General Counsel Jesse Rowe was identified by the Defendants as the "person most knowledgeable" pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure and testified on behalf of the Cabinet. [Record No. 73, p. 22 n. 11]

14 *Craigmiles* has not been uniformly followed. *See Powers v. Harris,* 379 F.3d 1208, 1218-19 (10th Cir.2006). *Powers* criticized the Sixth Circuit's holding that economic protectionism is not a legitimate interest. Yet, this Court is obligated to follow the well-reasoned holding of the Sixth Circuit in *Craigmiles.*

End of Document


juxtapose
Interior Design
Patti Morrow, Designer


interior design PROTECTION consulting

U.S. House Committee on Small Business

Subcommittee Hearing on Contracting and Workforce

Testimony of Patti Morrow

March 26, 2014

My name is Patti Morrow; I live in Greer, SC:

- Interior Designer/President - Juxtapose Interior Design
- Certified in Residential Design (RIDE)
- Certified Aging in Place Specialist (CAPS)
- Board of Directors, Design Society of America (DSA)
- Founder of Interior Design Protection Consulting (IDPC)

Like many other interior designers, I entered the field as a second career. When my children were 10 and 13, I enrolled in a 2-year interior design program at the New Hampshire Institute of Art (I was living in New Hampshire at the time). There were about 25 women in the class, all second-career changers.

As I was nearing the end of the interior design program, HB–881 was introduced in the New Hampshire legislature. If enacted, this bill would have become the most restrictive interior design law in the country and would have prohibited me from my dream of having my own interior design business.

In order to legally practice, an interior designer would need to have the "proper" credentials, aka "Three E's:"

1. Education. Graduate with a 4-year Bachelor Degree in Interior Design from an expensive, exclusive, privately accredited college. There are no such schools in the entire state.

2. Exam. Pass the National Council for Interior Design Qualification (NCIDQ) exam, an extremely burdensome private exam, which

a. Historically has had a less than a 40% passage rate for all three sections taken at the same time;

b. Can cost well over $2,000 to take

- $1,200 just to apply for the test
- Add in the cost of study guides and prep classes
- Travel and accommodations to take the 2-day exam.
- Each time a part of the test is failed, there's another fee to be paid

c. Is not under the purview of the state legislature, so anytime the exam is changed, it would result in defacto legislation, changing New Hampshire law without the knowledge or consent of the state legislature.

3. Experience. Complete an internship under one of the proposed licensed (NCIDQ-certified) designers which could take anywhere from 2 to 15 years. There were only 25 NCIDQ-cer-

tified in the entire state, and there was no guarantee that they:

a. Supported the licensing scheme
b. Were in a financial position or had enough work to hire an apprentice
c. Would be willing to pay vs. just offering a free internship
d. Would want to train a new designer who would eventually become a competitor

This bill was well in excess of what is needed to practice interior design, and would have put not only me, but the overwhelming majority of interior designers in New Hampshire out of business.

But why? What logical reason could there be for putting so many small business entrepreneurs out of business and creating a barrier to entry for anyone wishing to enter the field?

The bill asserted that interior design licensing was necessary to protect the health and safety of the public. But after doing my own extensive research, I found some very important facts:

- There's not a shred of evidence which would warrant a conclusion that the unregulated practice of interior design places the public in any form of jeopardy.
- 13 state agencies have studied the need for interior design regulation (sunrise and sunset reviews, Federal Trade Commission investigations, etc.) and without exception, all recommended against any type of regulation on the basis that it would add absolutely nothing to protect the public beyond that which is already in place (building inspectors, Certificate of Occupancy requirements, architects/engineers, fire marshals, construction code enforcement officials, consumer affairs actions, etc.).
- According to the Better Business Bureau and other data, since 1907, only 52 lawsuits have been filed against interior designers in the *entire country*. And nearly every single one of those involved contract disputes, not safety issues.[1]

It seemed to me that monopoly and the denial of free enterprise was the true objective of HB–881. This bill had come about not through public outcry or legislative determinations that regulation was necessary for the public good, but solely through the efforts of industry insiders who were asking the legislature to eliminate their competition for their own personal monetary gain.

This is obviously not a legitimate goal of good government, and I was not going to just sit back and let this small special interest group dictate who could and who could not practice interior design!

I contacted every interior designer and student I knew and organized a grassroots group to attend the hearing and testify against this bill. That bill was mercilessly defeated at that hearing in March of 2007 and has never reared its ugly head again.

---

[1] *Designing Cartels,* Dick Carpenter II, Ph.D., http://www.ij.org/designing-cartels-economic-liberty

Two years ago, I moved to South Carolina, and it was déjà vu, all over again. In 2012 and 2013, I had to take time away from my business to drive to Columbia multiple times to speak with legislators and testify at hearings. As of right now, the latest bill has been tabled.

But for how long?

Licensing this industry is nothing more than restraint of trade and is a JOB KILLER.

Interior design is a dynamic profession that celebrates innovation, creativity and diversity. Imposing a one-size-fits-all licensing scheme on the profession could not be more contrary to those values.

Because I am passionate about this topic, for the last eight years I have been networking and helping interior designers all across the country to help them protect their right to practice.

- 80% of interior designers are small business owners[2] and according to the Bureau of Labor Statistics, 40% are actually sole proprietors.[3]
- 84% of practicing interior designers do not have a degree in Interior Design[4]
- According to a study done by Harrington and Treber (Kenyon College), interior design regulations disproportionately exclude Hispanics, African Americans and second career-switchers.[5]
- Licensing prevents potential entrepreneurs of low income means from entering the work force, because they may not be able to afford the tuition of a four year college, the burdensome exam costs, or working for several years as an apprentice at little or no pay.[6]

Where do you draw the line? If you don't have the "right" credentials, you would be restricted from offering the following:

- Designs, drawings, diagrams, studies
- Consultations with clients
- Offering space planning services
- Recommend furnishings
- Drafting contract documents
- Researching and analyzing a client's requirements

These licensing bills are incredibly far reaching. You could not even give customers a recommendation as an employee of Home Depot!

And consumers lose, too. The Federal Trade Commission concluded that interior design regulations result in higher costs and fewer choices to consumers.[7]

---

[2] *Icon,* American Society of Interior Designers, 3/2014 http://browndigital.bpc.com/publication/?i=199326

[3] *The Interior Design Profession: Facts and Figures,* American Society of Interior Designers, 2007.

[4] Ibid

[5] *Designed to Exclude,* Harrington & Treber, 2009 http://www.ij.org/images/pdf_folder/economic_liberty/designed-to-exclude.pdf

[6] *The Myth of the "Three E's,"* Patti Morrow, 2010, http://www.idpcinfo.org/THREE_E_s.pdf

[7] United States of America, Federal Trade Commission, Dallas, 1987 and 1989

If there's a happy ending to this story, it's this.... Since 2007, over 150 state bills which would have expanded or enacted new interior design regulations have been defeated.

But like zombies, they just won't stay dead!

Conclusion

When Barack Obama was elected President, he did what many Presidents before him did—he redesigned the living quarters of the White House. Now, the District of Columbia is one of only four places in the United States that has full restrictions on practicing interior design without a license. So who did he hire? Michael Smith, an *un-licensed* interior designer from California. I'm sure he did not for one minute think he was placing the health and safety of his little girl in jeopardy.

If it's okay for the most protected person in the world to hire an unlicensed interior designer, shouldn't it be okay for everyone?

THE COST OF EXCESSIVE OCCUPATIONAL REGULATION AND WHAT ANTITRUST LIABILITY FOR LICENSING BOARDS CAN DO ABOUT IT

By Rebecca Haw

This testimony reflects only my views on the subject and not that of Vanderbilt Law School or Vanderbilt University. It draws from Aaron S. Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, U. PA. L. REV. (forthcoming 2014), a draft of which is available at http://ssrn.com/abstract=2384948.

Introduction

Although often overlooked, state licensing boards have become a significant exception to the Sherman Antitrust Act's ban on cartels. Boards are largely dominated by active members of their respective industries who meet to agree on ways to limit the entry of new competitors. But professional boards, unlike cartels in commodities or consumer products, are sanctioned by the state—even considered *part* of the state—and so are often assumed to operate outside the reach of the Sherman Act under a doctrine known as state action immunity.

The cost of the cartelization of the professions is on the rise. In the 1950s, only about five percent of American workers were subject to licensing requirements; now nearly a third of American workers need a state license to perform their job legally, and this trend is continuing.[1] Some recent additi8ons to the list of professions requiring licenses include locksmiths, beekeepers, auctioneers, interior designers, fortune tellers, tour guides, and shampooers. And even the traditionally-licensed "learned professions" are seeing a proliferation of licensing restrictions and regulations.

The excesses of professional licensing are easy to illustrate, Cosmetologists, for example, are required on average to have ten times as many days of training as Emergency Medical Technicians (EMT). In Alabama, unlicensed practice of interior design was a criminal offense until 2007. In Oklahoma, one must take a year of coursework on funeral service (including embalming and grief counseling) just to sell a casket, while burial without a casket at all is perfectly legal. And in some states, nurse practitioners must be supervised by a physician, even though studies show that nurse practitioners and physicians provide equivalent quality of care where their practices overlap.[2]

---

[1] *See* Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market,* 31 J. LAB. ECON. S173, S198 (2013).

[2] Morris M. Kleiner, et al., *Relaxing Occupational Licensing Requirements: Analyzing Wages and Prices for a Medical Service,* NBER Working Paper No. 19906 (February 2014).

Labor economists have shown that the net effect of licensing on the quality of professional services is unclear.[3] What is clear, according to their empirical studies, is the effect of licensing on consumer prices. Morris Kleiner, the leading economist studying the effects of licensing on price and quality of service, estimates that licensing costs consumers $116 to $139 billion every year.[4] And consumers are not the only potential losers, since more licensing means fewer jobs. To be sure, not all licensing rules are harmful. Some improve service quality and public safety enough to justify the costs, but many do not.

Despite wide recognition of the potential for economic harm associated with allowing professions to control their licensing rules and define the scope of their art, real reform is elusive. Part of the reason is that, in the professional licensing context, the most powerful legal tool against anticompetitive activity appears unavailable. Most jurisdictions interpret the Sherman Act to shield licensing boards from antitrust liability despite the fact that the boards often look and act like antitrust law's principal target. Other avenues for reform, including constitutional suits asserting the rights of would-be professionals, have done little to slow or reverse the trend towards cartelized labor markets.

Last year, in *North Carolina State Board of Dental Examiners v. FTC*,[5] the Federal Court of Appeals for the Fourth Circuit upheld an FTC decision finding a state licensing board liable for Sherman Act abuses, becoming the only appellate court to expose a licensing board to antitrust scrutiny and thereby creating a split between circuit courts. The Supreme Court has now granted certiorari, and one hopes the Court will take this opportunity to hold boards composed of competitors to the strictest version of its test for state action immunity.

In this testimony, I will cover three topics. First, I will sketch the economics of licensing, and the forces that gave rise to our system of professional self-regulation. Then I will discuss antitrust law as what I consider the most effective federal intervention in this otherwise state-level issue. Finally, I will briefly explain the legal landscape that gave rise to the circuit split over state action immunity for licensing boards and explain what I consider the Court's best course of action in next term's *North Carolina State Board of Dental Examiners.*

---

[3] *See* CAROLYN COX & SUSAN FOSTER, BUREAU OF ECON., FTC, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 21–27, 40 (1990).

[4] MORRIS M. KLEINER, LICENSING OCCUPATION: ENSURING QUALITY OR RESTRICTING COMPETITION? 115 (2006).

[5] 717 F.3d 359 (4th Cir. 2013).

I. Occupational Licensing Boards: The Road to Cartelization

A. The Scope of Professional Licensing: Big and Getting Bigger

Once limited to a few learned professions, licensing is now required for over 800 occupations.[6] And once limited to minimum educational requirements and entry exams, licensing board restrictions are now a vast, complex web of anticompetitive rules and regulations. The explosion of licensing and the tangle of restrictions it has created should worry anyone who believes that fair competition is essential to national economic health.

The expansion of occupational licensing has at least two causes. First, as the U.S. economy shifted away from manufacturing and towards service industries, the number of workers in licensed professions swelled, accounting for a greater proportion of the workforce. Second, the number of licensed professions has increased. Where licensing was once reserved for lawyers, doctors, and other "learned professionals," now floral designers, fortune tellers, and taxidermists are among the jobs that, at least in some states, require licensing.

Since boards are typically dominated by active members of the very profession that they are tasked with regulating, this dramatic shift toward licensing has put roughly a third of American workers under a regime of self-regulation. A study I conducted with my coauthor Aaron Edlin revealed that license-holders active in the profession have a majority of 90% of boards in Florida and 93% of boards in Tennessee. Given this composition, it is not surprising that boards often succumb to the temptation of self-dealing, creating regulations to insulate incumbents rather than to ensure public welfare.

B. The Anticompetitive Potential of Occupational Licensing

The anticompetitive potential of licensing is best illustrated with actual regulations passed by practitioner-dominated boards. What follows is by no means a complete list of excessive regulations, but it serves as a sample.

1. The New "Professions"

In Louisiana, all flower arranging must be supervised by a licensed florist, a scheme successfully defended in court as preventing "the public from having any injury" from exposed picks, broken wires, or infected flowers.[7] Minnesota (along with several other states) now defines the filing of horse teeth as the practice of veterinary medicine, a move that has redefined an old vocation as a regulated profession subject to restricted entry and practice

[6] KLEINER, *supra* note 4, at 5.
[7] Meadows v. Odom, 360 F. Supp, 2d 811, 824 (M.D. La. 2005), *vacated as moot,* 198 F. App'x 348 (5th Cir. 2006).

rules despite the fact that many consider the practice to be low-skill and low-risk. Similarly, state cosmetology boards have responded to competition from African-style hair braiders and eyebrow threaders by demanding that braiders and threaders obtain cosmetology licenses before they can lawfully practice their craft, even though practice requires no sharp instruments or chemicals, and involves no significant risk of infection.

2. Old Professions, New Restrictions

In many states, dental licensing boards restrict the number of hygienists a dentist can hire to two, a practice the FTC argues raises price but has no effect on quality of dental care.[8] Similarly, the advent of nurse practitioners and physician assistants has ignited a turf war between these "physician extenders" and doctors, resulting in a national patchwork of regulation related to physician supervision despite the fact that outcome studies reveal that unsupervised extenders' services are as safe and effective as that of supervised extenders. Lawyers, too, use licensing to limit competitions: advertising restrictions insulate lawyers from competition from other lawyers who can claim better average outcomes for clients. Moreover, each state has its own bar exam and licensing procedure, which reduces lawyer mobility across state lines. The justification for this is colorable—a different exam is necessary for each jurisdiction because of differing state laws—but it fails to account for practices such as California's requirement that lawyers qualified in other states retake the multistate portion of the exam when sitting for the California bar.

C. How We Got Here: Why License, and Why Self-Regulate?

1. The Economics of Licensing

The past twenty years have witnessed an explosion of empirical work on the effects of licensing restrictions on service quality and price. Economists agree that a licensing restriction can only be justified where it leads to better quality professional services—and that for many restrictions, proof of that enhanced quality is lacking.

a. The Costs of Licensing: Higher Consumer Prices

Studies that have the statistical power to identify a relationship between licensing and wages tend to suggest that licensing requirements raise wages by 10% to 18%, which has an obvious effect on consumer prices.[9] Likewise, most studies examining practice restrictions show that when a licensing board is more heavy-handed in dictating hours, advertising, or levels of supervision within a

[8] J. NELLIE LIANG & JONATHAN D. OGUR, BUREAU OF ECON. STAFF REP. TO THE F.T.C., RESTRICTIONS ON DENTAL AUXILIARIES: AN ECONOMIC POLICY ANALYSIS 44–47 (1987).

[9] Morris M. Kleiner, *Regulating Occupations: Quality or Monopoly?*, EMP'T RESEARCH (W.E. Upjohn Inst., Kalamazoo, Mich.), Jan. 2006, at 2 tbl.1, *available at* http://research.upjohn.org/empl_research/vol13/iss1/1.

profession, the consumer prices are higher. For example, restricting the number of hygienists a dentist may employ increases the cost of a dental visit by 7%,[10] and in optometry, restrictions on advertising have been shown to inflate prices by at least 20%.[11] Geographic restrictions—like nonreciprocity between states—also tend to increase consumer prices.[12]

But to get a complete picture of the economic harm from professional licensing, one needs a theory of how efficiently an unrestricted market would function. Advocates of licensing argue that the free market would do a poor job of efficiently allocating professional services to consumers because service quality would be too low without licensing. To the advocates of professional licensing, measuring the value of licensing by observing its effect on prices misses the point.

The notion that a free market would result in too-low quality service rests on two possible sources of failure in the market for professional services. First, absent licensing, the asymmetry of information between professional providers and consumers about the quality of service would create what economists call the "lemons problem." Second, free markets for professional services would result in sub-optimal quality because the market participants (providers and consumers) do not internalize all the costs of bad service. In other words, a free market for professional services creates negative externalities. But if licensing has *any* effect on the market failures it is designed to address, then it should improve service quality.

b. The Benefits of Licensing: Improved Quality?

The economic research on quality of service as a function of licensing paints a murky picture. Some studies show modest increases in quality, at least for some kinds of consumers, but other studies do not find that same effect. A few studies even claim to show that licensing *reduces* quality.[13]

2. The Durability of Our System of Professional Self-Regulation

If licensing can at least theoretically benefit consumers, why do we see so many obviously harmful licensing restrictions? The answer may lie with our current system of professional self-regulation, and its striking durability in the face of wide-spread criticism. When it comes to professional regulation, states have largely handed the reins of competition over to the competitors themselves. States justify this move by arguing that expertise is essential to creating efficient regulations, but it creates an obvious temptation

[10] LIANG & OGUR, *supra* note 8, at 40, 43.

[11] John E. Kowka, Jr., *Advertising and the Price and Quality of Optometric Services,* 74 AM. ECON. REV. 211, 216 (1984).

[12] One study estimated that universal reciprocity between states for dentists would result in a geographical reallocation of dentists generating $52 million (in 1978 prices) in consumer surplus. Bryan L. Boulier, *An Empirical Examination of the Influence of Licensure and Licensure Reform on the Geographical Distribution of Dentists, in* OCCUPATIONAL LICENSURE AND REGULATION 73, 94–95 (Simon Rottenberg ed., 1980).

[13] For a comprehensive discussion of this research, see Aaron S. Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?,* U. PA. L. REV. (forthcoming 2014), a draft of which is available at http://ssrn.com/abstract=2384948.

of self-dealing. In any other context, antitrust law could be used to prevent combinations of competitors from maximizing their own welfare at the expense of consumers. But because the dominant interpretation of antitrust immunity holds boards immune from Sherman Act scrutiny, antitrust law has until now had little impact on professional regulation. That leaves only constitutional avenues of redress, which have proven to be weak against self-dealing boards.

a. State Action Immunity Shields State Licensing Boards from Antitrust Liability

The Supreme Court first created antitrust immunity for "state action" in *Parker v. Brown,*[14] shielding state governments and bodies delegated a state's authority from federal antitrust liability. In holding that the Sherman Act does not apply to state government action, the Court found the identity of the actor—the state or private citizens—essential but provided no guidance on how to draw the line. This created serious problems for lower courts trying to apply *Parker* because states rarely regulate economic activity directly through a legislative act. Rather, states delegate rulemaking and rate-setting to agencies, councils, or boards dominated by private citizens.

The Court responded in 1982 with *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,*[15] which provided a test to distinguish private action from state action. To enjoy state action immunity, the Court held, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy to restrict competition," and the policy must be "actively supervised by the State itself." Since *Midcal,* however, the Court has created a category of entities not subject to the supervision requirement at all.[16] These entities, which include municipalities, enjoy immunity if they can meet the clear articulation prong alone. The circuits are split on whether state licensing boards are like municipalities in this respect; in particular, whether licensing boards dominated by competitors—who regulate the way they compete and exclude would-be competitors—enjoy state action antitrust immunity without being supervised by the state. The Supreme Court is poised to resolve this split in next term's *North Carolina State Board of Dental Examiners.* The last section of this testimony will further explore the legal question in that case.

b. The Common Route to Challenging State Licensing Restraints: Due Process and Equal Protection

With powerful antitrust immunities in place, the only viable avenue for consumers or would-be professionals seeking to challenge the actions of state licensing boards is to make a constitutional claim. Like all state regulation, professional licensing restrictions must not violate the due process and equal protection clauses of the Fourteenth Amendment. Due process prevents a state from denying someone has liberty interest in professional work if doing so has no rational relation to a legitimate state interest. Similarly,

[14] 317 U.S. 341 (1943).
[15] 445 U.S. 97 (1980).
[16] See Town of Hallie v. City of Eau Claire, 47 U.S. 34 (1985).

equal protection requires that states distinguish licensed professionals from those excluded from practice on some rational basis related to a legitimate state goal. The two analyses typically conflate into one question: did the licensing restriction serve, even indirectly or inefficiently, some legitimate state interest?

That burden is easy to meet, as illustrated by *Williamson v. Lee Optical,*[17] the leading Supreme Court case on the constitutionality of professional licensing schemes. Indeed, the Court has only once found an occupational licensing restriction to fail rationality review, in *Schware v. Board of Bar Examiners of New Mexico,*[18] and then only because an otherwise valid licensing requirement was unlawfully applied to an individual. In applying *Schware* to the activity of state licensing boards, lower courts have found even extremely thin justifications for anticompetitive licensing restrictions to suffice for rationality review. One circuit has even held that insulating professionals from competition is *itself* a legitimate state interest, making matters even more difficult for plaintiffs alleging harm to competition.

II. Why Sherman Act Liability for State Licensing Boards is a Good Idea

A. Antitrust Liability for Professional Licensing: An Economic Standard for Economic Harm

The Sherman Act—famously called "the Magna Carta of free enterprise" [19]—protects competition as a way to maximize consumer welfare. According to courts and economists alike, competition is harmed when competitors restrict entry or adhere to agreements that suppress incentives to compete. The normative question in both traditional cartel cases and licensing contexts should be the same: Does the combination, on net, improve consumer welfare? To ensure that this important question is asked and answered in the licensing context, antitrust law and its tools for balancing pro- and anticompetitive effects should be brought to bear on licensing schemes.

This close fit between the Sherman Act's intended target and the economic harm of excessive licensing can be seen in the functional equivalence of the restrictions promulgated by occupational boards and the business practices held unlawful under § 1. The Ohio Rules of Professional Conduct prohibit attorneys from advertising their prices using words such as "cut rate," "discount," or "lowest." But when similar restrictions on price advertising are imposed by private associations of competitors, rather than as a licensing requirement, it is per se illegal. Additionally, all lawyers must prove their "good moral standing" to join a state bar. But when a multiple listing service (a private entity not created by the state) comprised of competing real estate agents tried to impose a "favorable business

[17] 348 U.S. 483 (1955).
[18] 353 U.S. 232 (1957).
[19] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

reputation" requirement on its members, a court found the requirement to violate the Sherman Act because the standard was vague and subjective.

Thus, licensing schemes can be similar to cartel agreements in substance, which alone may justify antitrust liability. But making matters even worse for consumers, licensing schemes come in a particularly durable form. Licensing boards, by their very nature, face few of the cartel problems that naturally erode price and output agreements between competitors. By centralizing decision making in a board and endowing it with rulemaking authority through majority voting, professional competitors overcome the hurdle of agreement that ordinarily inhibits cartel formation. Cheating is prevented by imposing legal and often criminal sanctions—backed by the police power of the state—on professionals who break the rules. Finally, most cartels must fend off new market entrants from outside the cartel that hope to steal a portion of its monopoly rents. For licensed professionals, licensing deters entry and ensure that all professionals (at least those practicing legally) are held to its restrictions.

B. Antitrust Federalism: Its Modern Justifications and Applicability to Antitrust Liability for Licensing Boards

The most serious argument against Sherman Act liability for state licensing boards is that it would upset the balance between state and federal power struck in *Parker* and its progeny. But an examination of the normative commitments behind antitrust federalism, as revealed in scholarship and in the cases, reveals that boards—as currently comprised—should not enjoy immunity. All accounts of the purpose of antitrust federalism agree that self-dealing, unaccountable decision-makers should face antitrust liability. State licensing boards fall squarely in this category when a majority of members are competitors subject to or benefitting from the boards' rules.

For state licensing boards, the temptation of self-dealing is especially high and the potential for holding officials accountable especially low. First, those must hurt by excessive professional restrictions—consumers—are particularly ill-represented in the political process of licensure. Second, and most important, occupational licensing is currently left up to members of the profession themselves. When *Parker* is used to protect the efforts of incumbent professionals to restrict entry into their markets, it creates the very situation *Midcal* warned against—it casts a "gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." [20]

Public participation in state board activity is very low because as our empirical study of boards in Florida and Tennessee confirms, the typical state board is comprised of appointed professionals, not consumers or other public members. On one hand, practitioner dominance is inevitable. Tailoring restrictions to benefit the public

[20] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980).

(namely, encouraging competent practice) usually requires experience in the profession. But the need for expertise creates a problem: those who have the most to gain from reduced consumer welfare in the form of higher prices are tasked with protecting consumer welfare in the form of health and safety—the fox guards the henhouse.

II. *North Carolina State Board of Dental Examiners* and the Future of Immunity for Licensing Boards

Because any state mandate calling for the regulation of entry and good standing in a profession is likely to meet the Court's low bar for clear articulation, a board's status under *Parker* turns on whether it is subject to *Midcal's* requirement of supervision at all. Next term, the Supreme Court will consider this question for the first time. The case, *North Carolina State Board of Dental Examiners,* is an appeal from a Fourth Circuit case that held a licensing board to both *Midcal* prongs, creating a circuit split and delivering a victory to consumers and unlicensed professionals harmed by anticompetitive regulation. The Supreme Court should affirm the Fourth Circuit's decision, but also clarify, in contrast to the concurrence in the Fourth Circuit case below, that any board dominated by practitioners must pass Midcal's supervision requirement, no matter how the board's membership is elected.

The legal question in *North Carolina State Board of Dental Examiners* has its roots in *Town of Hallie v. City of Eau Claire,*[21] where the Court found a municipality immune under *Parker* because it acted pursuant to the state's clearly articulated policy to displace competition, despite being unsupervised. The Court reasoned that, for municipalities, supervision is unnecessary because there is no "real danger that [it] is acting to further [its] own interests, rather than the governmental interests of the State." Although *Hallie* did not provide a test for determining which entities, in addition to municipalities, are entitled to this fast track to immunity, a footnote provided a hint: "In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue."

Many courts concluded that occupational boards are among the "state agencies" to which the *Hallie* Court was referring, and thus exempted them from Midcal's supervision prong. Other courts equivocated, implying the possibility of needing supervision without holding so squarely, at least until last year when the Fourth Circuit decided *North Carolina Board of Dental Examiners v. FTC.*[22] This case is correctly decided because practitioner-dominated boards are very different from municipalities, which make decisions through elected officials and civil servants. In the case of incumbent-dominated boards, it cannot be said that "there is little or no danger" of self-dealing. For that reason, the Court should af-

[21] 471 U.S. 34, 47 (1985).
[22] 717 F.3d 359 (4th Cir. 2013).

firm the Fourth Circuit opinion holding licensing boards to the strongest test for antitrust immunity.

Conclusion

Licensed occupations have been free to act like cartels for too long without Sherman Act scrutiny. With nearly a third of workers subject to licensing and a continuing upward trend, it is time for a remedy. I do not propose an end to licensing or a return to a Dickensian world of charlatan healers and self-trained dentists. But the risks of unregulated professional practice cannot be used to rationalize unfettered self-regulation by the professionals themselves. The law needs to strike a balance. That balance is the same one sought in any modern antitrust case: a workable tradeoff between a restriction's salutary effects on the market and its harm to competition. Immunity from the Sherman Act on state action grounds is not justified under antitrust federalism when those doing the regulation are the competitors themselves, where they are not accountable to the body politic, where they have too often abused the privilege, and where the anticompetitive dangers are so clear. The threat of Sherman Act liability can provide the necessary incentives to occupational regulators trading off competition for public safety and welfare.

APPENDIX: FLORIDA

Occupational Board	Statutory Citation	Majority Licensed Professionals	Appointing Body	Rulemaking Authority	Criminal Enforcement
Board of Acupuncture	§ 457.101 *et seq.*	Yes	Governor	Yes	Yes
Board of Athletic Training	§ 468.70 *et seq.*	Yes	Governor	Yes	Yes
Board of Chiropractic Medicine	§ 460.401 *et seq.*	Yes	Governor	Yes	Yes
Board of Clinical Laboratory Personnel	§ 483.800 *et seq.*	Yes	Governor	Yes	Yes
Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling	§ 491.002 *et seq.*	Yes	Governor	Yes	Yes
Board of Dentistry	§ 466.001 *et seq.*	Yes	Governor	Yes	Yes
Board of Hearing Aid Specialists	§ 484.0401 *et seq.*	Yes	Governor	Yes	Yes
Board of Massage Therapy	§ 480.031 *et seq.*	Yes	Governor	Yes	Yes
Advisory Council of Medical Physicists (under authority of Department of Health)	§ 483.901 *et seq.*	No	FL Surgeon General	No	Yes
Board of Medicine	§ 458.301 *et seq.*	Yes	Governor	Yes	Yes
Board of Nursing	§ 464.001 *et seq.*	Yes	Governor	Yes	Yes
Board of Nursing Home Administrators	§ 468.1635 *et seq.*	No	Governor	Yes	Yes
Board of Occupational Therapy Practice	§ 468.201 *et seq.*	Yes	Governor	Yes	Yes
Board of Opticianry	§ 484.001 *et seq.*	Yes	Governor	Yes	Yes
Board of Optometry	§ 463.0001 *et seq.*	Yes	Governor	Yes	Yes
Board of Orthotists and Prosthetists	§ 468.80 *et seq.*	Yes	Governor	Yes	Yes
Board of Osteopathic Medicine	§ 459.001 *et seq.*	Yes	Governor	Yes	Yes
Board of Pharmacy	§ 465.001 *et seq.*	Yes	Governor	Yes	Yes
Board of Physical Therapy Practice	§ 486.011 *et seq.*	Yes	Governor	Yes	Yes

Board of Podiatric Medicine	§ 461.001 *et seq.*	Yes	Governor	Yes	Yes
Board of Psychology	§ 490.001 *et seq.*	Yes	Governor	Yes	Yes
Board of Respiratory Care	§ 468.35 *et seq.*	Yes	Governor	Yes	Yes
Board of Speech-Language Pathology & Audiology	§ 468.1105 *et seq.*	Yes	Governor	Yes	Yes
Board of Architecture and Interior Design	§ 481.201 *et seq.*	Yes	Governor	Yes	Yes
Board of Auctioneers	§ 468.381 *et seq.*	Yes	Governor	Yes	Yes
Barbers' Board	§ 476.014 *et seq.*	Yes	Governor	Yes	No
Building Code Administrators and Inspectors Board	§ 468.601 *et seq.*	Yes	Governor	Yes	Yes
Regulatory Council of Community Association Managers	§ 468.431 *et seq.*	Yes	Governor	Yes	Yes
Construction Industry Licensing Board	§ 489.101 *et seq.*	Yes	Governor	Yes	Yes
Board of Cosmetology	§ 477.011 *et seq.*	Yes	Governor	Yes	No
Electrical Contractors' Licensing Board	§ 489.501 *et seq.*	Yes	Governor	Yes	Yes
Board of Employee Leasing Companies	§ 468.520 *et seq.*	Yes	Governor	Yes	Yes
Board of Landscape Architecture	§ 481.301 *et seq.*	Yes	Governor	Yes	Yes
Board of Pilot Commissioners	§ 310.001 *et seq.*	No	Governor	Yes	Yes
Board of Professional Geologists	§ 492.101 *et seq.*	Yes	Governor	Yes	Yes
Board of Veterinary Medicine	§ 474.201 *et seq.*	Yes	Governor	Yes	Yes
Board of Professional Engineers	§ 471.001 *et seq.*	Yes	Governor	Yes	Yes
Board of Funeral, Cemetery, and Consumer Services	§ 497.001 *et seq.*	Yes	Governor	Yes	Yes
Board of Professional Surveyors and Mappers	§ 472.001 *et seq.*	Yes	Commissioner of Agriculture	Yes	Yes
Board of Accountancy	§ 473.301 *et seq.*	Yes	Governor	Yes	Yes

Real Estate Commission	§ 475.001 *et seq.*	Yes	Governor	Yes	Yes
Total Boards: 41		90%		98%	95%

APPENDIX: TENNESSEE

Occupational Board	Statutory Citation	Majority Licensed Professionals	Appointing Body	Rulemaking Authority	Criminal Enforcement
Board of Accountancy	§ 62-1-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Examiners for Architectural and Engineering Examiners	§ 62-2-201 *et seq.*	Yes	Governor	Yes	Yes
Board of Barber Examiners	§ 62-3-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Cosmetology	§ 62-4-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Funeral Directors and Embalmers	§ 62-5-201 *et seq.*	Yes	Governor	Yes	Yes
Board for Licensing Contractors	§ 62-6-101 *et seq.*	Yes	Governor	Yes	Yes
Real Estate Commission	§ 62-13-201 *et seq.*	Yes	Governor	Yes	Yes
Board of Examiners for Land Surveyors	§ 62-18-101 *et seq.*	Yes	Governor	Yes	Yes
Auctioneer Commission	§ 62-19-101 *et seq.*	Yes	Governor	Yes	Yes
Collection Service Board	§ 62-20-101 *et seq.*	No	Governor	Yes	Yes
Private Investigation and Polygraph Commission	§ 62-26-301 *et seq.*	Yes	Governor	Yes	Yes
Board for Licensing Alarm System Contractors	§ 62-32-301 *et seq.*	Yes	Governor	Yes	Yes
Real Estate Appraiser Commission	§ 62-39-201 *et seq.*	Yes	Governor	Yes	Yes
Motor Vehicle Commission	§ 55-17-103 *et seq.*	Yes	Governor	Yes	Yes
Soil Scientist Advisory Committee (under authority of Commissioner of Commerce and Insurance)	§ 62-18-201 *et seq.*	Yes	Commissioner of Commerce & Insurance	No	No
Geology Advisory Committee (under authority of Commissioner of Commerce and Insurance)	§ 62-36-101 *et seq.*	Yes	Commissioner of Commerce & Insurance	No	No
Home Inspectors Advisory Committee (under authority of Commissioner of	§ 62-6-301 *et seq.*	Yes	Commissioner of Commerce & Insurance	No	No

Commerce and Insurance)					
Advisory Committee for Acupuncture	§ 63-6-1001 *et seq.*	Yes	Governor	Yes	No
Board of Athletic Trainers	§ 63-24-101 *et seq.*	Yes	Governor	Yes	No
Board of Alcohol and Drug Abuse Counselors	§ 68-24-601 *et seq.*	Yes	Governor	Yes	No
Board of Chiropractic Examiners	§ 63-4-101 *et seq.*	Yes	Governor	Yes	Yes
Committee for Clinical Perfusionists	§ 63-28-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Communications Disorders and Sciences	§ 63-17-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Dentistry	§ 63-5-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Dietitian/Nutritionist Examiners	§ 63-25-101 *et seq.*	Yes	Governor	Yes	No
Board of Dispensing Opticians	§ 63-14-101 *et seq.*	Yes	Governor	Yes	Yes
Emergency Medical Services Board	§ 68-140-301 *et seq.*	No	Governor	Yes	Yes
Council for Licensing Hearing Instrument Specialists	§ 63-17-201 *et seq.*	Yes	Governor	Yes	Yes
Massage Licensure Board	§ 63-18-101 *et seq.*	Yes	Governor	Yes	No
Board of Medical Examiners	§ 63-6-101 *et seq.*	Yes	Governor	Yes	Yes
Medical Laboratory Board	§ 68-29-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Nursing	§ 63-7-201 *et seq.*	Yes	Governor	Yes	Yes
Board of Examiners for Nursing Home Administrators	§ 63-16-101 *et seq.*	No	Governor	Yes	No
Board of Occupational Therapy	§ 63-13-201 *et seq.*	Yes	Governor	Yes	Yes
Board of Optometry	§ 63-8-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Osteopathic Examination	§ 63-9-101 *et seq.*	Yes	Governor	Yes	Yes

Board of Pharmacy	§ 63-10-301 *et seq.*	Yes	Governor	Yes	Yes
Board of Physical Therapy	§ 63-13-301 *et seq.*	Yes	Governor	Yes	Yes
Committee on Physician Assistants (under authority of Board of Medical Examiners)	§ 63-19-101 *et seq.*	Yes	Governor	Yes	No
Board of Podiatric Medical Examiners	§ 63-3-101 *et seq.*	Yes	Governor	Yes	Yes
Polysomnography Professional Standards Committee (under authority of Board of Medical Examiners)	§ 63-31-101 *et seq.*	Yes	Governor	Yes	Yes
Board for Professional Counselors, Licensed Marital and Family Therapists, and Licensed Clinical Pastoral Therapists	§ 63-22-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Examiners in Psychology	§ 63-11-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Respiratory Care	§ 63-27-101 *et seq.*	Yes	Governor	Yes	Yes
Board of Social Worker Licensure	§ 63-23-101 *et seq.*	Yes	Governor	Yes	No
Board of Veterinary Medical Examiners	§ 63-12-101 *et seq.*	Yes	Governor	Yes	Yes
Total Boards: 46		93%		93%	76%